U.S. Department of Labor

Office of Administrative Law Judges
36 E. 7th St., Suite 2525
Cincinnati, Ohio 45202

(513) 684-3252
(513) 684-6108 (FAX)

Issue Date: 29 June 2004

Case No: 2002-ERA-00030

In the Matter of:

KENNETH J. TIPTON
Complainant

v.

INDIANA MICHIGAN POWER CO.
Respondent

PROPOSED DECISION AND ORDER

This case arises out of a complaint of retaliatory discharge filed pursuant to Section 211 of the Energy Reorganization Act of 1974 ("ERA"), as amended, 42 U.S.C. Section 5851, *et seq*. The implementing regulations are found at 29 C.F.R. Part 24. The ERA affords protection from employment discrimination to employees of Nuclear Regulatory Commission ("NRC") licensees who engage in activity that effectuates the purposes of the ERA or the Atomic Energy Act of 1954, as amended, 42 U.S.C. Section 2011, *et seq*. Specifically, the law protects so-called "whistleblower" employees from retaliatory or discriminatory actions by the employer. 42 U.S.C. § 5851(a)(1).

To establish a *prima facie* case of unlawful discrimination under the environmental whistleblower statutes, a complainant needs only to present evidence sufficient to raise an inference, a rebuttable presumption, of discrimination. As the Secretary and the Administrative Review Board have noted, a preponderance of the evidence is not required. *See Williams v. Baltimore City Pub. Schools Sys.*, ARB No. 01-021, ALJ No. 00-CAA-15, slip op. at 1 n. 7 (ARB May 30, 2003). A complainant meets this burden by showing that the employer is subject to the applicable whistleblower statutes, that the complainant engaged in protected activity under the statute of which the employer was aware, that the complainant suffered adverse employment action and that a nexus existed between the protected activity and the adverse action. *Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926, 933-934 (11th Cir. 1995); *Simon v. Simmons Foods, Inc.,* 49 F.3d 386, 389 (8th Cir. 1995).

Once a complainant meets his initial burden of establishing a *prima facie* case, the burden then shifts to the employer to simply produce evidence or articulate that it took adverse action for a legitimate, nondiscriminatory reason: a burden of production, as opposed to a burden of proof. When the respondent produces evidence that the complainant was subjected to adverse action for a legitimate, nondiscriminatory reason, the rebuttable presumption created by the complainant's

prima facie showing "drops from the case." *Texas Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248, 255 n.10 (1981). At that point, the inference of discrimination disappears, leaving the complainant to prove intentional discrimination by a preponderance of the evidence. *Cf. Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Thus, after a whistleblower case has been fully tried on the merits, the Administrative Law Judge does not determine whether a *prima facie* showing has been established, but rather whether the complainant has proved by a preponderance of the evidence that the respondent discriminated because of protected activity. *Williams*, slip op. at 1 n. 7.

If the complainant proves by a preponderance of the evidence that a retaliatory or discriminatory motive played at least some role in the respondent's decision to take an adverse action, only then does the burden of proof shift to the respondent employer to prove an affirmative defense and show that the complainant employee would have been terminated even if the employee had not engaged in protected activity. *Lockert*, 867 F.2d at 519 n. 2. Congress has specifically placed a higher burden on the employer in an ERA case in such circumstances, i.e., to demonstrate by "clear and convincing" evidence that it would have nevertheless taken the same action. 42 U.S.C.A. § 5851(b)(3)(D); *Schlagel v. Dow Corning Corp*., ARB No. 02-092, ALJ No. 01-CER-1 (ARB April 30, 2004).

I. Statement of the Case

Complainant, Kenneth Tipton, contends that he engaged in protected activity on September 26, 2001, when he complained to co-workers, his supervisor and other management personnel about his work hours exceeding NRC limits and Respondent's Cook Plant policy. He planned to be off that day due to his excessive work hours in the previous seven days but his supervisor requested that he come in to work. After requesting approval of a work hour deviation and, with assurances that one would be issued, Tipton reported to work but did not receive the requested approval form. After reporting to work, Tipton attended a meeting where he also requested an approved deviation form and discussed his excessive hours. Later that day, he submitted to Cook Plant management and his supervisor a subsequent deviation request by e-mail. Hours later, Respondent embarked on a fact-finding investigation to determine why an assignment was conducted in a manner contrary to management's directives. Cook Plant suspended Tipton and ultimately terminated him five days later. Tipton asserts that his suspension and termination amounted to discriminatory or retributory action for his engagement in protected activity.

Respondent counters that Tipton did not engage in any protected activity and furthermore, that Tipton's termination stemmed from legitimate reasons: failure to follow management directions, for lying during a fact-finding investigation about his attendance at a turnover meeting and for past performance problems. Respondent alleges that after-acquired evidence establishes that Tipton violated the Electronic Communications Policy of the company and consequently, that he would have been terminated eventually. I&M denies that Tipton's work hours entered into the decision to terminate him or that his comments were even discussed.

II. Procedural History

Complainant, Kenneth Tipton, began working for Respondent, Indiana Michigan Power ("I&M"), as a contractor through BCP Technical Services at the Donald C. Cook Nuclear Power Plant ("Cook Plant") in May of 1999. In November of 1999, I&M hired Tipton as a full-time employee at the Cook Plant until his termination on October 2, 2001. *See* JX 1, 38. Tipton filed a complaint with the Department of Labor in February of 2002, alleging that his termination violated the employee protection provisions of the Energy Reorganization Act of 1974 ("ERA"), 42 U.S.C. § 5851 (1988 & Supp. V 1994). The Occupational Safety and Health Administration ('OSHA") investigated the complaint and on July 11, 2002, issued a recommendation of dismissal, which Tipton timely appealed on July 16. ALJX 17, 18. On December 4, 2002, the Nuclear Regulatory Commission ("NRC") issued a letter to American Electric Power Company, the holding company of I&M, advising them that allegations of discrimination against a former engineer who raised safety issues were unsubstantiated. RX 16.

A formal hearing, held in St. Joseph, Michigan, began July 22, 2003, and continued through July 30, 2003. The parties submitted timely post-hearing briefs. The conclusions and findings follow.[1]

III. Issues

1. Whether complainant engaged in protected activity under the Acts;

2. Whether Claimant shows by a preponderance of the evidence that the protected activity constituted a contributing factor in the adverse actions[2] taken;

3. Whether Employer shows by clear and convincing evidence that legitimate, nondiscriminatory reasons for the adverse action exist;

4. What damages, if any, the complainant is entitled to because of the retaliatory actions taken by respondent.

---

[1] The following citations to the record are used herein:

ALJX – Administrative Law Judge Exhibit;
JX – Joint Exhibit;
CX - Complainant Exhibit;
RX - Respondent Exhibit; and
TR - Transcript of the hearing

[2] Employer concedes that adverse personnel action occurred when the suspension and subsequent termination happened. Post-hearing brief at 36, FN 3.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

IV. Statement of the Facts

A. Background

In August of 2001, the Cook Plant, consisting of two nuclear reactors, shut down to perform maintenance on the Essential Water Service System ("ESW"). This forced outage occurred due to a significant amount of silt from Lake Michigan entering the coolant water of the Plant. Water drawn from Lake Michigan by the ESW provides cooling water to the Plant's systems, requiring balancing and maintaining so that disbursement of adequate amounts of water throughout the system occurs. Setting the valves in the ESW precisely, down to a quarter handwheel turn, permits adequate cooling for all Plant systems. Operations personnel rely on pre-determined settings, provided in a Technical Databook[3] to set the equipment. Flow Balance Tests determine the valve positions necessary to achieve sufficient flows for normal operations and for emergencies. Updating the valve settings requires a formal revision process including mandatory review and approval of all changes made to the Tech Databook in accordance with a document control management system. The valve settings must be kept current utilizing this process.

During the August 2001 shutdown, the Plant operated on a tight schedule with critical path activities, activities upon which other actions are predicated, closely monitored. The ESW Flow Balance Test, considered a critical path activity, needed to be completed before the reactors advanced to the next stage, or Mode, in the re-start process. Completing the ESW Flow Balance test required a series of steps to be checked off and annotated. Thereafter, updating the Tech DataBook completes the test process.

Kenneth Rollins provided oversight of the maintenance activities, including testing at the Cook Plant, as conducted by the Maintenance Testing Group. He reported to the manager of Maintenance Testing and Installation Services, Rick Tinkle who reported to the Maintenance Director, Jim Molden. Newly appointed supervisor of the Testing Group, Ed Brouwer, also reported to Tinkle. Brouwer assumed his position one month before the ESW process began with the reactors' shutdown, yet he possessed little experience with performing systems tests.

[3] Various witnesses and exhibits refer to the "tech data book", the "TDB", the "Technical Data Book", or the "Tech Databook." For clarity's sake, I will use "Tech Databook."

From September 18 through 25, 2001, Kenneth Tipton, a test engineer,[4] was involved in the ESW flow balance testing. Before then, there had been a number attempts to test that system. TR 696. Tipton had responsibilities with regard to the performance of the ESW test and revising the procedure used for testing. At this time, Tipton's supervisor was Ed Brouwer. Tipton worked with other test engineers and procedure writers, including Mark Turcotte.[5] TR 699. Mark Stark, in charge of the whole test performance, was Tipton's in-line manager for testing. TR 699-700. From September 18 until his last day of work on September 26, Tipton performed testing and revisions of the procedure for testing. TR 700. Stark, also the maintenance manager in September 2001, reported directly to Molden. TR 1510-1511. He replaced Rick Tinkle, former maintenance testing group manager, in September 2001. TR 1512-1513. Because Stark possessed more experience with testing, he was selected for his position because Brouwer and Tinkle possessed only limited backgrounds in testing. TR 298, 1514. When he was appointed to supervise the testing, Brouwer claims he expressed concerns that the test-engineering group was understaffed, overworked, and that he did not possess the appropriate background or experience to be involved in testing. TR 307. He stated that the workload increased as a result of the forced outage. TR 309.

During the week of September 18, there were numerous unsuccessful attempts to conduct the ESW flow balance test. TR 702. The consequence of these failures was that justification of the operability of the ESW system occurred through an "operability determination evaluation," or ODE. TR 702. The ODE, whose purpose is to allow the system to be declared operable, permitted the Plant to return to power. Even if the tests are not successfully completed, the Plant can be restarted through an evaluation providing a reasonable assurance of operability. The ODE provides the bridge between the failed tests and the restart of the Plant. TR 703.

At the beginning of September 18, a plan developed for the next seven days of the flow balance test. Typically, the flow balance test might take only a day or two. TR 324. However, during the course of that week the original plan changed when the first test failed and the test engineers discovered that one of the valves had been set incorrectly from the previous performance of the flow balance test and this issue needed correction. TR 706-707. These changes to the plan increased the hours Tipton worked based on the revisions required of the procedures and the necessary retest. TR 707. The testing engineers worked 12 to 14 hour days during this ESW testing in which all the tests failed. TR 315, TR 702. Brouwer submitted a request to the Control Room personnel to secure 24-hours-per-day, seven-day a week access for his personnel from September to October 5. JX 27. He testified that management made the decision to work without breaks during the ESW testing in order to expedite the re-start process and to regain profitability. TR 324.

---

[4] Respondent asserts numerous times that Tipton was the "lead" test engineer, citing to Ed Brouwer's testimony, at TR 314, for example. However, the evidence does not support this contention. Rather the testimony shows that where Tipton had more experience that is mechanical and the ability to converse with management, he was assigned by his supervisor to work days rather than nights. Other testimony and exhibits show that while Tipton used to hold a supervisory position, he did not at the time of these events.

[5] Mark Turcotte, a contractor employer by Sun Technical Services, filed suit under the whistleblower provisions of the ERA against I&M. The suit ended in a confidential settlement. *Turcotte v. Indiana Michigan Power Co.*, 2002-ERA-31 (September 4, 2002).

Two specific issues needed resolution during the final week of ESW testing on reactor Unit I. The first dealt with water flows lower than the acceptable criteria and the second involved the degree of play or "slop" in a couple of motor valves. TR 1527. The "slop" issue related to an identified discrepancy regarding the hand-wheel positions, which needed review by engineering and confirmed to support a change in the Tech Databook. This engineering review came in the form of a Design Information Transmittal ("DIT") and, if confirmed, supported the incorporation of tolerances into the Tech Databook revision. JX 37 p. 2. The "DIT" describes how the flow issues should be addressed where the flows were lower than needed based upon the design of the Plant and provides an engineering basis for using some tolerance for the valves.[6] TR 1530.

After preparation of the DIT, use of the ODE details restrictions upon how the Plant may operate. For example, if the DIT places an upper limit of 75 degrees on the lake water intake and the water temperature rises above that, then the ODE would require the Plant to lower the power level at which it was operating or to shut down the reactor. TR 1530-1531. The ESW testing evinced a flow level below the acceptable margin by as much as a hundred gallons per minute out of 5,000 gallons per minute. TR 1331. The Tech Databook functions as a compilation of points that operations personnel use to determine where something is or should be when utilizing their procedures. TR 1531-1532.

B. September 25th

The final events leading to Tipton's suspension and ultimate termination began on September 25, 2001, when Turcotte[7] and Tipton discovered the above two issues, prepared condition reports concerning their findings and thus initiated another step in the process that needed resolution before the restart process could continue. TR 1331, 1335, JX 115, 114. After initiating and completing these condition reports, the imposition of a Mode 4 constraint[8] occurred preventing the Plant from proceeding to the next level in the re-start process until one of two things happened. TR 1334-1336. Either performance of a DIT analysis would justify incorporation of some tolerance or the issue mandated retesting for the system to be considered operable. TR 1341. To permit the "plus or minus two turns" tolerance to be incorporated, the engineering analysis must support a flow deviation based on the lake temperature. TR 1340. After discovery of these two issues, the shift supervisor ordered the Plant cooled down, returning it to Mode 5 or the lowest level mode to achieve complete re-start at Mode 1. TR 1336.

As of the end of his shift on the 25th, Tipton testified that the ESW Flow Balance Test was field complete, meaning that there would be no more testing or manipulations of equipment. TR 715-716. All that remained of the testing, completion of the procedural paperwork, could be closed out by the night shift. TR 716. After submission of the condition reports by Turcotte and Tipton during that day's shift, the night shift arrived to address the problem. TR 1342. The

[6] The previously listed valve positions in the Tech Databook now required many more turns to achieve the appropriate water flows.

[7] Turcotte worked as a contractor assigned to support the outage testing. While normally assigned to review the procedure in accordance with 10 C.F.R. § 50.59, Turcotte also supported the test engineers during the ESW testing.

[8] To return to full power, each nuclear reactor unit needed to be tested and evaluated through five Modes.

night shift conducted an analysis of the flow deviations and the engineering department began writing a DIT. An Operational Design Evaluation, "ODE," would permit restart of the Plant with successful analysis of these issues. TR 1343. During the night, the parties and respective departments determined that successful analysis could be conducted to justify the incorporation of the tolerances. The DIT, expected by 11:00 a.m. on the 27th, would lead to the Tech Databook update necessary to move the Plant back to Mode 4.

According to Tipton, he informed his night shift replacement, Tony Chacon that he would not be coming to work the next day in order to re-set his hours in accordance with the NRC's limitations of no more than 72 hours in a rolling week and due to fatigue. TR 715, TR 910-913. He also stated that he asked Chacon to inform their supervisor, Brouwer that he would not be in the following morning. Chacon's testimony differed, however, as he did not specifically recall this conversation and did not inform Brouwer, their supervisor, of Tipton's absence. TR 1717-1719. His testimony at the hearing is as follows:

> Q Did you have an understanding when you met with Mr. Turcotte early in the morning that Mr. Tipton was coming in?
>
> A When he left the prior night he said he was tired and I, I understood that he may or may not come in but I wasn't sure if he would come in or not.
>
> …
>
> Q Is it fair to say that you knew Ken was not there on September 26th because the previous shift, the previous day on September 25th Ken told you he was tired and wanted to stay home because he had worked a lot of hours?
>
> A I would say I remember him saying he was tired. I don't remember if it was for hours or what but I know he did look tired even the next day when he came in. Yes, I'll say that.
>
> …
>
> Q (reviewing Mr. Chacon's deposition) Do you know why he wasn't there on the 26th? Answer: I believe because he was tired and wanted to stay home. Question: How do you know that? Answer: Well, I remember him saying something about he was really tired the last time we talked and he had worked lots of hours and think he needed the day off.
>
> A Okay.
>
> Q Do you recall saying that?

A I'm sure I said that because that's what I remember but I, I don't, you know.

Q Maybe, was that accurate?

A Yes.

TR. 1713-1719. Chacon also relayed to Brad Williamson, the independent investigator hired by I&M, that he knew Tipton would not be in on the morning of the 26th. JX 37 at 2.

C. The Turnover Meeting

Thereafter, on the morning of September 26, 2001, Tipton stayed home from work rather than working the 6:00 a.m. to 6:00 p.m., or later, shift as he had been doing for the previous seven days. TR 715, TR 1693. At the end of his shift that day, Chacon drafted the proposed Tech Databook change in anticipation of the DIT justification of the "+/- 2 turns" tolerances for the value positions. JX 59. Plant Management, aware of the prepared draft, expected that when the DIT arrived at 11:00 a.m. that day, the draft and the DIT would "link up" and the newly issued Tech Databook change would permit completion of the surveillance. TR 1344.

Chacon and Tipton usually conducted a face-to-face "turnover" of the previous shift's progress. When asked about the turnover process, Chacon testified that normally only one turnover occurred at each shift change. TR 1732. Tipton testified that he and Chacon usually sat down "face to face," exchanged information and physically looked at the procedure together. TR 724-725. The term "turnover" as used at the Cook Plant did not have a universal definition. TR 724. Instead, employees used the term to describe the transfer of one shift's worth of work assignments to the next shift so that work on projects proceeded with continuity. However, turnover also seemed to be used interchangeably with the more generic term "meeting." TR 1943. Jim Molden, the Maintenance Director, testified regarding turnovers:

Q There's no hard and fast definition of what a turnover meeting is, is there?

A Definition of what a turnover meeting is?

Q Yeah.

A No.

Tipton defined turnover as a situation

> [W]hen you have two people or two groups of people and the first group of people has items they're working on and responsibilities. They are leaving shift and they are turning over those work assignments and responsibilities to oncoming personnel.

TR 723. Tipton described turnovers as normally face-to-face with written follow-up or transfer of information to verify that all parties understood their assignments. TR 723-724. Not every exchange or encounter between two people at the Cook Plant constituted a turnover. TR 724.

Around 6:00 a.m. on the 26th, Chacon focused his end-of-shift turnover on Mark Turcotte who he believed would be the responsible Test Engineer that day. JX 37. During their approximately one-half to one-hour turnover, Chacon informed Turcotte of the draft Tech Databook change he wrote and also provided details of the night's events with instructions regarding the completion of the ESW flow balancing test. TR 48-50, 1713. To supplement this verbal exchange, Chacon e-mailed these instructions, as was his habit in turnovers, to Turcotte with a copy to Brouwer. JX 105, TR 1714, 1716. Both Chacon and Tipton testified that when they conduct a turnover, an e-mail is transmitted to the person to whom the information is transferred. Chacon acknowledged that he never sent Tipton any such e-mail that day. He did send such an e-mail to Turcotte because that was the person to whom he had actually turned over that morning. Neither Turcotte nor Brouwer copied this written version of the turnover to Tipton. TR 729, TR 733. At some point, Brouwer joined Turcotte and Chacon in their turnover for a brief period in Chacon's office.

D. Phone Call to Tipton

Shortly after 7:00 a.m., Brouwer called Tipton on Chacon's office speakerphone to ask him to report to work that day. JX 152, TR 1726, 1790. According to Tipton, Tipton's wife, Chacon and Turcotte, Brouwer asked Tipton to come in for a meeting but Tipton initially refused unless Plant management approved a deviation form permitting him to work hours in excess of the NRC and Cook Plant policy limitations. TR 51-53, 718-720, 953-958, 1790-91. Brouwer testified that Tipton did not mention his work hours, the work hour limitations, or any reason why he did not report to work. TR 330-31. Tipton asserts, and other witnesses corroborate, that he did inform Brouwer that he was over his hours, that he wanted clarification from Plant management directing him to come in, and that he requested verification that a deviation form would be approved for his work hours. TR 719. Specifically, Tipton had Stark and Tinkle in mind as the management personnel he referenced. TR 720. Brouwer's recollection of the call is sketchy and not as detailed as Chacon's, Turcotte's, Tipton's, and Mrs. Tipton's, but the others are consistent with each other and therefore, I will accord probative weight to their version of the call's contents.

Thereafter, Joint Exhibit 7 shows a second call placed to Tipton's residence some 11 minutes later. *See, also,* TR 720. Testimony from Tipton, Turcotte, and Tipton's wife alleges that Brouwer directed Tipton to come in stating "…I confirmed that you need to come in." TR 720. Tipton believed that refusing to report as directed would amount to insubordination in spite of his excessive hours. *Id. See* JX 6 at 4.

E. 8:30 a.m. Meeting

After Tipton reported to work, Turcotte came into his office with the test procedure some time around 8:30 a.m.[9] TR 726. The two men discussed what Chacon had done and what remained to be done regarding the test. TR 728. At some point, Chacon came twice into Tipton's office and spoke with Turcotte and then left again. TR 729, TR 2005. Brouwer arrived during one of Chacon's visits and stood in the doorway of Tipton's office before also leaving. TR 731. This gathering in his office was a chaotic and disjointed encounter with numerous distractions from others in the Plant, including phone calls to Tipton. Brouwer informed Tipton and Turcotte that a meeting would occur at 9:00 a.m. with Plant Management. During this time, Tipton asked Brouwer several times for the approved deviation request. TR 1727. Chacon testified that Tipton's primary focus during the gathering at 8:30 was to get his deviation approval. TR 1731. Tipton and Turcotte were reviewing the procedure and Turcotte had Chacon's prepared draft in his hand. JX 59, TR 1987

Tipton testified that he did not consider this exchange a turnover meeting for several reasons. TR 732. First, because Chacon had already turned over to Turcotte, and second, because Chacon did not discuss with Tipton directly what remained to be done, and third, because he did not receive any written turnover notes or three-way communication.[10] TR 732. If Tipton believed that Chacon was turning over to him, he would have expected something in writing from Chacon. TR 733. No one directed Tipton to read or obtain a copy of the written Chacon turnover information. JX 105, TR 734. Chacon testified that the 8:30 turnover with Tipton was very fast and very brief, lasting no more than two or three minutes. TR 1731-1734. He stated that it was not the same as the turnover with Turcotte. TR 1731. He also said that a normal turnover occurred only once per shift. TR 1732. Chacon stated in his deposition that he didn't believe that Tipton would be in that day and that he didn't need a turnover because he believed that Turcotte would be handling the Tech Databook update. TR 1735. Chacon gave his cursory turnover to Tipton because Brouwer instructed him to do so before he left for the day.

Brouwer testified that just prior to 9:00 a.m.; he presented Stark with a deviation request for Tipton's hours and informed him that they were already over the regulatory limits. TR 333; JX 10-11. According to Brouwer, Stark refused to approve the deviation because he thought it would have constituted retroactive approval of excess hours and deviations are to be approved in advance. TR 337-338, 1547. Brouwer testified that he had not filled in the dates for the form and therefore, it did not appear retroactive as presented to Stark. TR 337-341. When Stark refused to approve the form, Brouwer threatened to take the request to the Plant Manager. TR 349-350. Stark discouraged him from doing so and Brouwer did not pursue the matter at that time. TR 351. Stark denied this exchange and instead claims that Brouwer failed to present the form until much later that day. TR 1546. In his deposition he claimed that he received the deviation request after the 9:00 a.m. meeting. TR 1547. However, based on the corroborating testimony of the other employees present at the meeting and on my credibility findings, I find that Stark

[9] This gathering will be referred to as the 8:30 meeting although some testimony indicates it may have occurred around 8:45 a.m.

[10] The three-way communication utilized at Cook Plant involved an exchange of information or instructions between two people who then echo back what was communicated to them.

received information regarding Tipton's working hours prior to the start of that meeting. This information prompted him to make the statement about Tipton needing to get out of the Plant and, therefore, I find that Brouwer's version of the events surrounding presentation of the deviation request is more credible.

F. The 9:00 a.m. Meeting

Thereafter, Tinkle held a meeting run by Stark with Brouwer, Tipton, Turcotte, Craig Barbehenn, Sam Verma, Eric Lee, and Steve Papageorgiou present. TR 735 (hereinafter referred to as the "9:00 meeting"). Stark led the meeting and made assignments to the various employees in two categories: for the Unit 1 testing close out and for the Unit 2 testing gear-up. Corroborated testimony reveals that he began the meeting by noting "we need" to get Tipton out of there as soon as possible. TR 741. Tipton received the assignment to close out the procedure and input the job order comment remarks know as the CREM. TR 739. Uncontroverted testimony reveals that Turcotte received responsibility for the Tech Databook update.

Near the end of this meeting, Tipton testified that he requested to see the approved deviation request authorizing his excessive hours. He believed the deviation had already been signed based on his phone conversation with Brouwer. TR 737. When Stark failed to respond, Tinkle remarked that his time should exclude turnover time. TR 738-39. Tipton informed them that even excluding turnover time, he was exceeding seventy-two hours in seven days. TR 739, 1456, 1499. Neither member of management responded. Testimony indicates that Tipton requested his deviation form twice during the meeting. TR 72, 1455. Turcotte addressed a related issue of pressure coming from the Command Outage Center ("OCC"). He told Stark that he should push back at the OCC because people were tired and apt to make mistakes. Turcotte asked Stark to have managers stop directing people to work hours in excess of the work hour limits and also mentioned that Tipton had exceeded the regulatory limits on hours.

G. The Tech Databook Changes

Thereafter, those in attendance disbursed to complete their assignments. Stark assigned to an employee the job to track the DIT progress and keep him informed but that employee failed to do so. Tipton proceeded to commence work on the CREM notes and Turcotte reviewed the Tech Databook draft, Joint Exhibit 59, provided by Chacon. Some time during the morning, Turcotte realized that the Chacon draft contained inaccurately transposed data and that some included valves should be deleted per the procedure. RX 35 at 51. When the DIT did not arrive by 11:00 a.m. Turcotte decided to correct the Chacon draft errors, have the data reviewed by Tipton and approved by Brouwer in order to meet the noon deadline imposed by Stark.

The job of the reviewer, according to the language of procedure at PMI-4010 § 4.1.4 (b), is to ensure that there are no transposition errors from the test data to the Tech Databook update. TR 1991. In other words, the approved data from the approved procedure, derived in an approved manner, are transposed into a summary document. RX 35 at 52, 56-57.

Turcotte, Brouwer, and Tipton all believed that the Chacon draft, Joint Exhibit 59, did not meet this procedure because extraneous valves were included and because the justification for

dealing with the valve "slop", the "+/- two" turns tolerances, was not yet approved. TR 368. These three believed that the addition of the "+/- two turns" modified the Technical Specification requirements because no flow verification testing was ever performed. RX 36, TR 143, 405-407, 409. Turcotte testified that implementation of the tolerances should have been evaluated to see if it needed NRC approval because it modified the technical specification surveillance requirement and was thereby a change to Plant configuration. TR 143-144. Rather than establish the valves by flow test, use of the DIT established them by engineering judgment. Consequently, Turcotte decided to submit his Tech Databook change, Rev 15,[11] without the tolerances in order to meet the deadline of noon. RX 35 at 54, JX 13. As a result, the post-DIT reviewers did not have to spend time reviewing the test procedure and comparing it to the data presentation. TR 1994, JX 13, JX 17. Instead they need only incorporate the tolerances from the DIT. TR 408, JX 17.

Brouwer authorized the submission of Rev 15 prior to the DIT's arrival so that Turcotte could meet the noon deadline and because he believed that it was the appropriate way to proceed. TR 402-404, 429-430. Rev 15 was a data presentation or a presentation of information from the surveillance test. TR 404. Brouwer testified that Stark's deadlines were firm and he believed that, even without the DIT, the revision should be completed by noon. TR 403, 414, 488. Thereafter, Stark received notification that the Tech Databook change was complete at 1:00 p.m., although no one notified him that the DIT was done. TR 1548. Brouwer testified that Stark was tracking the progress of the DIT himself. TR 415. Assuming that Rev 15 incorporated the DIT, Stark notified the Outage Command Center that the update could be removed as a critical path activity. TR 1548-49. He admitted at the hearing to supplying this erroneous information to the OCC. TR 1550, 1552.

During the afternoon of the 26th, Tipton continued working on his own assignment to close out the job procedure and finish the CREMs. Due to the large number of interruptions caused by calls asking for his assistance, Brouwer disconnected Tipton's phone and turned off his pager around 1:00 p.m. TR 369-370. Although Stark initially stated that Tipton should get out of the office by noon, around 4:00 p.m., Stark requested that Tipton and Brouwer meet with another member of management. TR 376-377, JX 67. In order to permit Tipton to finish his assigned tasks, Brouwer instead attended the meeting with Jim Parker. TR 377. Stark knew that Tipton was still working throughout the afternoon because of his frequent calls during the day. TR 378. At approximately 4:30 p.m., Tipton completed his tasks and sent an e-mail to Plant Managers and Brouwer again requesting his deviation approval form. JX 16.

Meanwhile, Turcotte drafted a second Tech Databook change using the Rev 15 data but incorporating the expected tolerances from the DIT. The DIT arrived sometime around 4:30 p.m. TR 426. This draft was signed off as Rev 16 using the exact draft as prepared by Turcotte and was ready for signatures within five minutes of the DIT's arrival. TR 424, 427, JX 17. Turcotte signed as the initiator, Marty Dixon as reviewer, and Stark as approver. TR 409. Brouwer refused to sign as approver because he did not agree with the tolerance issue methodology used to justify the tolerances. TR 409-410, 489-491.

[11] The initial Tech Databook update is identified as a revision and herein after will be referred to as "Rev 15" and the following update, as approved by Stark, will be referenced as "Rev 16".

At 2:00 p.m., Stark learned that the DIT had not been issued. TR 1549. He notified the OCC, Jim Molden and plant manager Joe Pollock that the Tech Databook, Rev 15, was incorrect. TR 1550. Molden instructed Stark to "go fix it." At 3:00 p.m., Stark told Turcotte and Brouwer to correct the Tech Databook Rev 15. TR 1551-52. At 4:30 p.m. that evening, Stark went to the OCC turnover meeting where Joe Pollock told Stark and Ken Rollins to "hand carry, hand walk, whatever you have to do to ensure" that the update has constant oversight and to instigate a fact-finding investigation into the issue of why the Chacon draft, Joint Exhibit 59, was not used. TR 1552. At this time, Turcotte had already completed the draft that became Rev 16 with the tolerances included, but because the change was no longer a straight data presentation, after incorporation of the tolerances, an applicability determination was required. TR 1554-56. Completion of Rev 16 and the applicability determination occurred around 7:00 p.m. TR 1556.

H. The Fact-Finding Investigation

Stark interviewed Turcotte that same evening around 6:00 p.m. as to the issuance of Rev 15 pre-DIT arrival. TR 1557-58. Turcotte stated that he decided to make changes to the Chacon draft because the information in it was incorrect. JX 65. All members of the 9:00 a.m. meeting, except Tipton, were asked to record their version of the morning's events in a statement.[12] TR 1560-61, JX 66, JX 67. Fact-finding meetings took place with Brouwer and Chacon that evening. TR 1561-62. Plant management directed that Tipton and Turcotte have their Plant access turned off. Sometime later, both men were suspended and locked out of the Plant.

At 8:00 p.m., Brouwer was directed to return to work even though he had worked a full shift that day. TR 420-421. Tinkle asked Brouwer to write down his recollection of the day's events and he was questioned regarding the Tech Databook update. TR 422, JX 67. Brouwer spent approximately four to five hours at the Cook Plant that night and thereby exceeded the NRC regulatory limits of working more than 16 hours in a 24-hour period. TR 421, 497. After completing his recollection, Tinkle and Stark interviewed Brouwer on what was then the early morning of September 27, 2001. RX 1, TR 495. When asked what he could have done differently to prevent confusion, Brouwer replied that a more experienced supervisor was needed as well as more testing staff, stating that the organization was "spread too thin." RX 1 at 3. He then referred to the interview as a "witch hunt" and said that no one had anything but the best intentions and no one intentionally held things up. He verified that Tipton attended the 8:30 meeting with Chacon, himself and Turcotte.

During Chacon's interview, he stated that he conducted a 6:00 a.m. turnover with Turcotte and then met with Tipton, Turcotte, and Brouwer around 8:00 a.m. to discuss his Tech Databook draft and the applicability determination draft. TR 1563-64, JX 66. Brouwer relayed his statement and confirmed that he told Chacon to also have a turnover with Tipton when he arrived. JX 67, TR 1566. The next morning, Stark, a representative from Sun Technical[13] and Donna Kelly from Human Resources attempted to interview Turcotte but he refused to answer questions, referring to his lock out from the Plant as harassment and informing the group that he

[12] Turcotte supplied a written version of the events of his own accord. In his statement he accepted full responsibility for the manner in which the Tech Databook revision was done.
[13] Sun Technical provided contract engineers to Cook Plant including Mark Turcotte.

had already spoken with the NRC. TR 1571-15762, JX 70. The investigating team informed him that he was suspended pending the outcome of the fact-finding.

Tipton's interview occurred next and is memorialized at Joint Exhibit 71. He was asked "Did you have a turnover meeting at 0830 with Tony Chacon & was the Tech Databook discussed?" Tipton answered "No" that he was not at the turnover with Tony and that the Tech Databook was not discussed. JX 71 at 1-2. Several hours later, Stark and Kelly interviewed Brouwer again. JX 72. The interview consisted of two questions: who was at the 8:30 turnover and if he was confident that all four individuals were present. Brouwer again confirmed Tipton's and Chacon's presence but was not sure about Turcotte. JX 72. Chacon was also re-interviewed and asked "Turnover at 8 or 8:30 you stated Mark, Ed, you & Ken were there. Tell us who was there?" JX 73; TR 1889. He replied that all four were present but Brouwer was not there long. He also confirmed that Turcotte had a copy of the draft but not Tipton. JX 73. On September 28, 2001, Chacon wrote another statement that a turnover was held in Tipton's office with Tipton present and that the ESW turnover procedure requirements were discussed. JX 74.

Rollins, Stark, and Kelly called Brouwer in for yet a third interview the following night. The detail of which will be discussed at length, *infra*. JX 75. In sum, Brouwer complained that calling him in again violated the working hour procedure and again verified that Tipton was present at the 8:30 meeting. JX 75. On September 28, 2001, Turcotte agreed to be interviewed with Brouwer, Sun Technical, Stark, Kelly and Molden in attendance. TR 1588. According to Respondent, Turcotte continued to be uncooperative. Post-hearing brief at 31, JX 37, TR 1587. He did, however, accept full responsibility for the Tech Databook change. JX 37 at 66-73. Jim Molden asked Turcotte about bringing up Tipton's working hours at the 9:00 a.m. meeting and the fact that twice Tipton requested a deviation but did not get it. JX 37 at 71. The next notation in the interview notes though, is Mark Stark saying "No further questions." JX 37 at 72. After this exchange, Turcotte was asked about the three meetings held that day: 0600, 0830, and 0900. He replied that he did not attend the 8:30 meeting. When asked "what meeting was the turnover", Turcotte answered "closer to 0600." Molden queried Turcotte about whether Ken (Tipton) and Tony (Chacon) met and he responded that he did not know because he was concentrating on his own business.

The interview notes continue for two pages with questions about the turnovers. The purpose of Molden's question regarding Tipton's hours, along with Stark's attempt to end the questioning on the topic, imply that something about Tipton and his hours concerned Molden enough that he brought it into the investigation. This questioning lies in glaring contrast to the assertions that management never discussed Tipton's complaints nor did that topic enter into any discussions or the decision to terminate Tipton.. Yet Molden, who was not present for the 9:00 a.m. meeting when Tipton complained, must have learned about Tipton's complaints at some point and from someone. It is clear that he believed these complaints were relevant to the investigation of Tipton and Turcotte, yet the investigation was to center on the Tech Databook change. Additionally, Tipton's complaints about the hours had no relevance to the management directions for the Databook change and had no bearing on determining the cause of any delays.

I. Termination

The fact-finding investigation ended with a Recommendation of Action of Termination from Stark and Kelly, although they were not Tipton's supervisor or manager. Neither Brouwer nor Tinkle participated in the decision to terminate Tipton, even though they were his supervisor and manager, respectively, at the time. The decision to terminate Tipton occurred on Saturday and that Monday, October 5, 2001, he was terminated after refusing to resign.

V. Credibility Determinations

I have carefully considered and evaluated the rationality and internal consistency of the testimony of all witnesses, including the manner in which the testimony supports or detracts from the other record evidence. In so doing, I have taken into account all relevant, probative, and available evidence, while analyzing and assessing its cumulative impact on the record. *See, e.g., Frady v. Tennessee Valley Authority*, 92-ERA-19 at 4 (Sec'y Oct. 23, 1995) (*citing Dobrowolsky v. Califano*, 606 F.2d 403, 409-10 (3d Cir. 1979)); *Indiana Metal Products v. National Labor Relations Board*, 442 F.2d 46, 52 (7th Cir. 1971). An Administrative Law Judge is not bound to believe or disbelieve the entirety of a witness' testimony, but may choose to believe only certain portions of the testimony. *See, Altemose Constr. Co. v. National Labor Relations Board*, 514 F.2d 8, 15 n. 5 (3d Cir. 1975).

Credibility is that quality in a witness, which renders his evidence worthy of belief. For evidence to be worthy of credit,

> [it] must not only proceed from a credible source, but must, in addition, be 'credible' in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe it.

Indiana Metal, 442 F.2d at 52. An Administrative Law Judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. *See, Altemose,* 514 F.2d 8, n.5.

Moreover, based on the unique advantage of having heard the testimony firsthand, I have observed the behavior and outward bearing of the witnesses and gathered impressions as to their demeanor. In short, to the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and the demeanor of witnesses. Probative weight is granted to the testimony of all witnesses found credible.

The transcript of the hearing in this case is 2013 pages, comprised of the testimony of sixteen different witnesses. My credibility findings follow.

I find the testimony of Mark Turcotte, contract engineer, very credible. He presented straightforward and convincing testimony and his deportment evinced candor. Additionally, his

statements were substantiated by a number of other witnesses regarding key elements of this case and his explanations comported with reason and existing facts. He remained consistently detailed in his responses throughout his appearance as a witness. Consequently, I find his testimony persuasive and worthy of probative weight.

Ed Brouwer, supervisor of the test engineers, testified in a very credible manner as well as possessing a generally good memory of overall facts. I find his testimony worthy of probative weight in the main but note that his recollection of the phone conversation with Tipton on the morning of September 26, 2001, was vague and did not comport with the objective documentation. When compared with versions of the call presented by other witnesses, I find his testimony on this topic lacked sufficient detail, although he gave no indication of dishonesty by his conduct. In sum, I find his overall testimony was delivered truthfully and note that the lack of detail on this topic was not as inconsistent with the rest of his testimony as to affect the veracity of his statements.

Craig Barbehenn, contract testing engineer, testified in a generally credible fashion. I accord his testimony probative weight where he responded consistently during the hearing. Sam Burma, also an engineer involved in the ESW flow testing, appeared to be a good witness and testified with credulity.

James Parker testified as a testing engineer employed at Cook Plant for three and one-half years. He testified credibly and his testimony is accorded probative weight.

Kenneth Tipton, Complainant, testified articulately and in a straightforward manner. By his conduct and his demeanor at the hearing, I find him to be credible. His responses were candid and particularly forthright for the most part. His version of the events surrounding September 26th was plausible and appeared sincere. Tipton demonstrated general consistency throughout the hearing and offered sufficiently detailed responses to the questions presented to him. On three discrete points, Tipton hedged in his replies to opposing counsel's questioning, particularly as it related to his job dissatisfaction at Cook Plant. When asked whether it was his personal responsibility to abide by the working hours limitations, he seemed to hesitate and skirt the issue. He also hedged on questions of whether he was already over the hours limitations on the morning of the 26th or whether he just thought he was going to be over if he reported.

Respondent attempts to show that Tipton's testimony may be discredited where, for example, he claims to have worked over a Christmas holiday, yet the payroll records show him to be off that day. RX 48, TR 1923-27. However, I note that in his performance appraisal, Tipton received kudos for working over a holiday weekend, without complaint, to complete needed testing. JX 26 at 29. Consequently, I find that this discrepancy in the particular holiday over which he worked is not indicative of any dishonesty or exaggeration on his part to affect his credibility.

Overall, I find by his demeanor and conduct that his testimony was convincing, delivered honestly and is worthy of probative weight.

Curtis Miles, supervisor of the Maintenance Department and Engineering Test Group, testified very credibly and answered questions directly and without hesitation. I accord his testimony probative weight.

Kenneth Rollins, assistant director of the Maintenance Department, testified with credulity and forthrightness for most of his testimony but at times appeared evasive. Overall, I find his testimony fairly probative.

James Molden, the Maintenance Director reporting directly to the Plant Manager, exhibited very credible conduct during his testimony. He demonstrated a forthcoming demeanor and I accord his testimony probative weight.

Byron Tinkle, Manager of Maintenance Testing and Installation Services, worked under Jim Molden in September of 2001. Between Molden and the test engineers worked Brouwer. I found Tinkle to be the least exacting of the witnesses in his remarks and to be equivocal in his demeanor at the hearing. Consequently, I accord his testimony only some weight.

Mark Stark, I find his testimony strikingly contradictory and unreliable when confronted with his deposition. His demeanor and responses to Complaint's counsel's questioning appeared changeable, sarcastic, nervous and inconsistent. Some of his responses appeared insubstantial and improbable in light of the evidence. When confronted with statements made at his deposition, contrasting with his testimony on the stand, he was belligerent by demeanor and conduct. However, when questioned by the Respondent's counsel he appeared very credible and accommodating. I have serious reservations regarding the manner in which he engaged in the fact-finding investigation and note with suspicion, his testimony regarding his findings. Consequently, I discount his testimony and grant it less weight accordingly.

Anthony (Tony) Chacon, test engineer, testified with an honest demeanor and in a candid fashion. I find his testimony trustworthy and probative.

Teresa Tipton, Tipton's girlfriend and later wife, testified very credibly. Her statements were consistently made with more than sufficient detail. In addition, I note that Ms. Tipton was asked about several intimate and personal details but she did not equivocate or hedge in her replies. I assign her testimony great probative weight.

Michael Horvath, Employee Concerns Program Manager, testified with a nervous, fidgety manner. However, he appeared basically credible and I find his testimony to be fairly probative.

Donna Kelly, Human Resources Administrator, testified in a credible fashion and I accord her testimony probative weight.

VI. Applicable Law

It must be determined whether the complainant has proven, by a preponderance of the evidence that he engaged in protected activity under the ERA, that a supervisor, also an

employee of Respondent, took adverse action against him, and that complainant's protected activity was a contributing factor in the adverse action that was taken. *Kelly v. Lambda Research, Inc*., 2000-ERA-00035, at *16 (ALJ April 26, 2002), *citing Dysert v. Secretary of Labor*, 105 F.3d 607 (11th Cir. 1997); *Simon v. Simmons Foods*, 49 F.3d 386 (8th Cir. 1995); *Ross v. Florida Power and Light*, Case No. 1996-ERA-00036, ARB Case No. 98-044, Fin. Dec. & Ord., Mar. 31, 1999, slip op. at 6; *see also* 42 U.S.C. § 5851(b)(3)(C). Since this case was fully tried on the merits, I need not determine whether Tipton presented a *prima facie* case however, I will address the elements as contested by I&M. *See, U.S.P.S. Bd. of Governors v. Aikens,* 460 U.S. 711, 713 (1983); *Carroll v. Bechtel Power Corp.,* Case No. 91-ERA-0046, Final Dec. and Order, Feb. 15, 1995, slip op. at 11 n.9, *aff'd sub nom; Bechtel Corp. v. U.S. Dep't of Labor,* 78 F.3d 352 (8th Cir. 1996); *Kester v. Carolina Power & Light Co.*, ARB No. 02-007 (Sept. 30, 2003)(discouraging the unnecessary discussion of whether the *prima facie* whistleblower elements are present when the case is fully tried on the merits.).

42 U.S.C. § 5851 defines the employee protections for those discriminated against for engaging in protected activities:

> (a) Discrimination against employee
>
> (1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or person acting pursuant to a request of the employee)--
> (A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.);
> (B) refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer;
> (C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or the Atomic Energy Act of 1954;
> (D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;
> (E) testified or is about to testify in any such proceeding or;
> (F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended.

The burdens of proof are established in § 5851 (b)(3):

> The Secretary shall dismiss a complaint filed under paragraph (1), and shall not conduct the investigation required under paragraph (2), unless the complainant has made a prima facie showing that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) of this section was a contributing factor in the unfavorable personnel action alleged in the complaint.
> (B) Notwithstanding a finding by the Secretary that the complainant has made the showing required by subparagraph (A), no investigation required under paragraph (2) shall be conducted if the employer demonstrates, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of such behavior.
> (C) The Secretary may determine that a violation of subsection (a) of this section has occurred only if the complainant has demonstrated that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) of this section was a contributing factor in the unfavorable personnel action alleged in the complaint.
> (D) Relief may not be ordered under paragraph (2) if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior.

Tipton bears the burden of establishing that the reasons advanced by Indiana Michigan Power for the termination action were not the true reasons for the action but instead, that his engagement in protected activity contributed in part to the adverse action. *See, Bechtel Const. Co. v. Sec'y of Labor*, 50 F.3d 926, 935 (11th Cir. 1995) (*quoting St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 510 (1993)). The words "a contributing factor" . . . mean any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision. This test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a "significant," "motivating," "substantial," or "predominant" factor in a personnel action in order to overturn that action. *Marano*, 2 F.3d at 1140 (citations omitted).

Only if complainant meets his burden by a preponderance of the evidence does the burden shift to the employer to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the employee's behavior. 42 U.S.C. 5851(b)(3)(D); *Trimmer*, 174 F.3d at 1102. Although there is no precise definition of "clear and convincing," the Secretary and the courts recognize that this evidentiary standard is a higher burden than preponderance of the evidence but less than beyond a reasonable doubt. *See, Yule v. Burns Int'l Security Service, supra.* If Tipton establishes by a preponderance of the evidence that his engagement in protected activity contributed to the termination decision, I&M may nonetheless avoid liability under the dual, or mixed, motive doctrine. Under that doctrine, the employer must establish by clear and convincing evidence that it would have taken the adverse action in the absence of the protected activity engaged in by the complainant. *Combs v. Lambda Link,* ARB No. 96-066, ALJ Case No. 95-CAA-18, Oct. 17, 1997, slip op. at 4 and cases cited therein.

VII. The Protected Activity

In a claim of retaliation or discrimination arising under the ERA, the complainant must demonstrate that he participated in protected activity, which furthers the purpose of the ERA. 42 U.S.C. § 5851 (1)-(3); 29 C.F.R. § 24.2. An informal complaint to a supervisor may constitute protected activity. *See, e.g., Nichols v. Bechtel Construction, Inc.*, 1987-ERA-00044 (Sec'y Oct. 26, 1992) (employee's verbal questioning of foreman about safety procedures constituted protected activity), appeal dismissed, No. 92-5176 (11th Cir. 1992); *Dysert v. Westinghouse Electric Corp.*, 1986-ERA-00039 (Sec'y Oct. 30, 1991) (employee's complaints to team leader protected). To constitute protected activity under the ERA, an employee's acts must implicate safety definitively and specifically. *American Nuclear Res., Inc. v. United States Dep't of Labor*, 134 F.3d 1292, 1295 (6th Cir. 1998).

A. Do the Working Hours Limitations Implicate Safety Definitively and Specifically?

I&M contests that Tipton engaged in any protected activity and, specifically, denies that complaints about exceeding the work hour limitations implicate safety. Post-hearing Brief at 36-47. Tipton avers that he engaged in protected activity by notifying his supervisors that he worked in excess of the hours permitted under Nuclear Regulatory Commission ("NRC") regulations and in accordance with Cook Plant Policy. He contends that the purpose behind these regulations and policies is to address safety issues related to the fatigue of workers. To that end, he submitted several exhibits addressing this issue. First, Joint Exhibit 129 contains the technical specifications of the Cook Plant pertaining to the NRC policy on working hours and Joint Exhibit 5 is NRC Generic Letter 82-12. Joint Exhibit 129 provides that the amount of overtime worked by staff members performing safety-related functions must be limited in accordance with the NRC policy statement on working hours under Generic Letter 82-12. JX 129 at § 6.2.2.e.

The NRC-mandated Generic Letters refer to the need to establish policies and follow the regulatory limits so that fatigue does not affect Plant staff who perform safety- related functions. The NRC specifically focuses on the use of personnel and excessive use of overtime and the reference for I&M's Working Hour Limitation's Policy is NRC Generic Letter 82-12. (AEP; NRC: 0450C); "Policy on Factors Causing Fatigue of Operating Personnel at Nuclear Reactors." Joint Exhibit 123 at 8 states:

> Licensees of operating plants and applicants for operating licenses shall establish controls to prevent situations where fatigue could reduce the ability of operating personnel to keep the reactor in a safe condition. The controls should focus on shift staffing and the use of overtime - - key job-related factors that influence fatigue. The objective of the controls would be to assure that, to the extent practicable, personnel are not assigned to shift duties while in a fatigued condition that could significantly reduce their mental alertness or their decision making capability. The controls shall apply to the plant staff who perform safety-related functions (e.g.,

> senior reactor operators, reactor operators, health physicists, auxiliary operators, and key maintenance personnel).
>
> Enough plant operating personnel should be employed to maintain adequate shift coverage without routine heavy use of overtime. The objective is to have operating personnel work a normal 8-hour day, 40-hour week while the plan is operating. However, in the event that unforseen problems require substantial amounts of overtime to be used, or during extended periods of shutdown for refueling, major maintenance or major plant modifications, on a temporary basis, the following guidelines shall be used.

JX 5 at 4. (Emphasis added).

Second, Generic Letter 82-12 does authorize deviations from the regulatory limits; however**,** the regulation is clear that deviations are a limited exception to the rule:

> Recognizing that very unusual circumstances may arise requiring deviation from the above guidelines, such deviation shall be authorized by the plant manager or his deputy, or higher levels of management. The paramount consideration in such authorization shall be that significant reductions in the effectiveness of operating personnel would be highly unlikely. Authorized deviations to the working hour guideline should be documented and available for NRC review.

JX 5 at 3.

The NRC states, "this requirement applies to all licensees of operating reactors and applicants for operating licenses." JX 5 at 3. The mandatory provision of these working hour limitations is restated in Joint Exhibit 5 at 1. The limitations on hours without a deviation request executed by Plant management are listed at Joint Exhibit 5 at 2-3 at paragraphs a, b, c, and d, in effect at the Cook Plant as of September 26, 2001. Joint Exhibit 123 states:

> a. An individual should not be permitted to work more than 16 hours straight (excluding shift turnover time).
>
> b. An individual should not be permitted to work more than 16 hours in any 24-hour period, nor more than 24 hours in any 48-hour period, nor more than 72 hours in any seven day period (all excluding shift turnover time).
>
> c. A break of at least eight hours should be allowed between work periods (including shift turnover time).
>
> d. Except during extended shutdown periods, the use of overtime

> should be considered on an individual basis and not for the entire staff on shift.

JX 5 at 2-3.

These limitations are standard in the commercial nuclear industry and are carried out through procedures such as in Joint Exhibit 5. Deviations from the limits above must be requested in advance. JX 123 at 7. The purpose is "to prevent people from becoming exhausted to the point where their performance and judgment is impaired." TR 123. At the middle of the page at Joint Exhibit 5 at 2, it states:

> These administrative procedures shall also set forth a policy, the objective of which is to prevent situations where fatigue could reduce the ability of operating personnel to keep the reactor in a safe condition. The controls established should assure that, to the extent practicable, personnel are not assigned to shift duties while in a fatigued condition that could significantly reduce their mental alertness or their decision-making ability. The controls shall apply to the plant staff who perform safety-related functions (e.g. senior reactor operators, reactor operators, auxiliary operators, health physicists, and key maintenance personnel).

The working hour limitations procedure, contained in Joint Exhibit 123, is used to implement the technical specification requirement incorporating the NRC Generic Letter. TR 124-125.

Third, the NRC Generic Letter 82-12 provides that "the purpose of working hour limitations is to ensure that personnel are alert and fully capable of performing their assigned duties." The limitations apply to direct employees of I&M as well as to contract employees. The term "Key Maintenance Personnel" refers to personnel who are responsible for the correct performance of maintenance, repair, modification or calibration of safety-related structures, systems or components, and who are personnel performing or immediately supervising the performance of such activities. JX 4 at 1. (NRC Generic Letter 83-14).

Testimony at the hearing supports Tipton's assertions that the complaints about excessive working hours implicated safety concerns definitively and specifically. Stark testified that Turcotte raised a concern about the stress and pressure that "we had put on the employees with regard to testing activities." TR 1612. Stark also agreed that excess stress at the work place involving safety-related components "can itself be a safety-related issue" testifying "I agree with that." TR 1612.

The ESW system tested is safety related pursuant to 10 CFR 50.2, which defines:

> *Safety-related structures, systems and components* means those structures, systems and components that are relied upon to remain functional during and following design basis events to assure:

> (1) The integrity of the reactor coolant pressure boundary
>
> (2) The capability to shut down the reactor and maintain it in a safe shutdown condition; or
>
> (3) The capability to prevent or mitigate the consequences of accidents which could result in potential offsite exposures comparable to the applicable guideline exposures set forth in §50.34(a)(1) or §100.11 of this chapter, as applicable.

See also, TR 693.

Thus the term "safety related" has a specific meeting within the federal regulations and the nuclear industry. It refers to systems, structures and components "that are required to safely shut down the reactor or to prevent a release of radioactivity that could endanger the health and safety of the public." TR 30-31. The ESW system is safety related under that definition because the safety systems within the Plant will not function without it and, further, the ESW system is required by the technical specifications to operate the Plant.

Another example, cited by Turcotte, was the containment spray system, which is designed to prevent the containment unit from breaking under a worst case accident scenario, where heat could be transferred from the containment to the essential service water. Without the ESW system, the Plant would not function in the event of a serious accident. TR 31. The "heat" discussed by Turcotte comes from the nuclear fuel in the reactor; "you could have a serious release of radioactivity into the environment" if heat is not removed from the system due to the failure of the Essential Service Water System. TR 32.

Both Turcotte and Tipton were key maintenance personnel, pursuant to the Generic Letter, working on safety-related issues in the Essential Service Water System and thus the safety-related working hours limitations applied to them. TR 127-128. Ed Brouwer and Tony Chacon were working on safety-related activities during the same period. TR 128. In addition, Turcotte testified that: the working hours limitations were the limits taken from the Generic Letter and "required by the tech-specs;" that the technical specification in Joint Exhibit 129 is required for operating the Plant because it is safety significant and a regulatory requirement; and that the purpose is "to prevent people from becoming exhausted to the point where their performance and judgment is impaired." TR 123. By regulatory, he meant that "it's law." TR 122.

Molden agreed that the federal regulations dealing with operating license requires that a nuclear license holder have technical specifications. One of those specifications is the working hour limitations of no more than 72 hours in seven days without a deviation request. TR 1426. Stark testified that the phrase "Regulatory Limit" in Joint Exhibit 123 at 6 was in fact an "NRC Regulatory Limit." TR 1601. That section prohibits a manager or supervisor from directing an employee to work in excess of 72 hours in a seven day period without a deviation request. TR 1601. Such an employee must be sent home if he works in the absence of an approved request. TR 1602.

Language in the middle of the deviation approval form, under "type of deviation requested," refers to work over 72 hours in a seven-day period as a "*Regulatory Limit*." This exhibit lists Complainant, Brouwer, Chacon, Turcotte, and many others and authorizes work beyond the outage *administrative limit* set by Cook, but not the 72-hour regulatory limit set by the NRC. It was signed by Supervisor Brouwer, approved by Department Manager Rick Tinkle, and finally approved by the Plant Manager Joe Pollock for the period from September 8, 2001 until October 8, 2001. Despite the requirement of the NRC that only under "very unusual circumstances" should the limits be exceeded in Joint Exhibit 5 at 3, Turcotte testified that deviation requests were "a very routine thing." TR 128-129.

Consequently, I find that the working hour limitations definitively and specifically implicated safety concerns and that they applied to Tipton. I also find that complaints about the working hour limitations constitute protected activity.

I will now address whether Tipton engaged in this protected activity.

B. <u>Did Tipton Engage in the Protected Activity?</u>

Tipton asserts that he complained on numerous occasions about the work hours exceeding the limitations as discussed, *supra*. On September 25, Tipton worked from 6:00 a.m. to 8:00 or 8:30 p.m. plus additional hours "at the direction of Stark and Papageorgiou to write up my recollection of positioning of one of the motor operated valves." TR 713. Tony Chacon, the night shift engineer, also worked 6:00 p.m. to 6:00 a.m. on September 25.

Testimony included the following statement: "For the individuals involved they worked . . . 14 hours a day until the job was done." TR 315. The job was "done" when the flow balance testing was completed, signed off and finalized. TR 316. Tipton testified that during testing:

> [T]there was tremendous pressure. There was,…it's a critical path activity and it directly affects whether the plant will produce power so there's lots of management oversight, and that results in lots of management attention, lots of statusing, are you done yet, are you done yet?

TR 708.

According to Tipton, "the directive was to work around the clock to get the ESW flow-balance done. That was . . . put out by management even in e-mails and other items" as referring inferentially to Brouwer and Stark. TR 712.

Respondent's Exhibit 45 is Tipton's statement to an NRC representative:

> Q. Were you scheduled to be off on September 26th?

A. - There was no disseminated work schedule. The normal working schedule for my department was four 10 hour days per week (Tuesday thru Friday). I was directed by my management (Mark Stark) to act as the day-shift ESW Flow Balance Test supervisor[14] (12+ hour shift) until further direction, or completion of testing. No individual was scheduled to relieve me. Testing was completed late in the afternoon on September 25th and I planned to take September 26 off due to my level of fatigue and because management's (Mr. Stark) directive had been met (testing complete).

Q. Who scheduled that day off for you?

A. I decided to take the day off due to fatigue and completion of testing.

Q. Did company management know at that time (Sep. 25) that you would exceed your hours so you needed some time off?

A. Yes, company management was acutely aware of the hours/days I had been working. I was directed to continue to work those hours by management (Mr. Stark) on a daily basis. I was also statusing Management of testing progress numerous times on a daily basis, at their behest.

RX 45.

Chacon testified that Tipton raised an issue of manpower going into the outage and the scope of the work involved. "We were . . . short of people and . . . the test crew has . . . some contractors [to] supplement us." TR 1747. Chacon testified that Tipton vocally expressed to management concerns of manpower and work load. TR 1747. Chacon agreed that the testing group in September 2001 was understaffed: "we should have [had] about 7 test engineers full-time..." TR 1747-1748. At that time, they had five test engineers. TR 1748.

Brouwer, appointed supervisor for purposes of the Flow Balance Test, expressed concern that the testing group was understaffed, overworked, and that his background did not lend itself to be testing supervisor. TR 302, 307. At that time, he expressed his prediction to management that testing would not go as expected because of the workload and many tests "could not be done as scheduled because of equipment problems." Management had no response to this except "to

[14] This is the only reference in the record to Tipton being a lead test engineer during this phase of the forced outage. The record supports that he held this "position" during the July-August testing but did not have added authority while Brouwer was supervisor of this testing phase.

go forth and do good." TR 308. Brouwer's impression about understaffing, based upon conversations with the test engineers, including Chacon, Parker, and Complainant, developed before he became supervisor. TR 308-309. Brouwer told Investigator Brad Williamson that his work group was significantly short staffed. JX 37 at 24. As supervisor, Brouwer scheduled his test engineers for 12-hour shifts plus turnover time. TR 321. Responsibility for setting schedules and monitoring worker hours, even if the employees maintained their own time for work hour limitation purposes, fell to this supervisor. TR 322.

Brouwer testified that Cook Plant hired insufficient staff to cover the day and night shifts to perform the ESW. TR 301-302. With respect to the number of hours worked by the test engineers, four of his subordinates worked 12-hour shifts plus turnover time over seven straight days, albeit all but Tipton and Brouwer received one day off during that week. In Joint Exhibit 27 at 2, an e-mail from Brouwer to Tipton, Chacon and other engineers in the testing group dated September 25, 2001 at 8:53 a.m., Brouwer requested "to ensure continued around the clock test engineer coverage of the ongoing ESW Flow Balance Testing, please ensure that the following personnel have the control room (plus vital area) access for the time period starting now through October 5, 2001." JX 27 at 2. According to Brouwer, "around the clock" meant a "24-hour evolution . . . until the testing was done." TR 318. Plant management contemplated no breaks for that testing. TR 318. More importantly, the only test engineers employed to conduct the testing are the ones listed at Joint Exhibit 27 at 2. Tipton testified that he was involved in around-the-clock testing, which "means you go 24/7." TR 710. Despite the additional work during a forced shutdown, there were no additional resources given from management. TR 710-711.

1.Tipton Engaged in Protected Activity in a Phone Call

It is uncontested that sometime after 7:00 a.m. on September 26, Brouwer, Turcotte, and Chacon called Tipton at home on a speakerphone. TR 718, JX 7. According to Tipton, Brouwer told him "I need you to come in for a meeting." Tipton's testimony is that he replied "you know Ed, I've been working a ton of hours this week and I know if I'm not over, I am going to be over my hours and I need you to verify that I'm being required to come in" and Brouwer said he would do that. TR 719. Tipton stated that he wanted Brouwer to confirm with management that, based upon his working hours, they were "directing" him to come in. Even though Brouwer was his supervisor, "I was trying to ensure that that was a consensus opinion of management that I was being directed to come in." TR 719. By "management" Tipton was referring to Mark Stark and Rick Tinkle. TR 719-720. Brouwer agreed to talk to them and the phone call ended. At 7:18 a.m., the phone rang again with Brouwer on the line and Tipton relayed their conversation as follows:

> A. He said yes, you need to come in and he said I confirmed *you need to come in so*...I said I'll be there in a few minutes.
>
> Q. What did you consider your obligation at that point after your phone call with Ed Brouwer?

A. Well, I considered that I better come in because that's what I was being directed to do and if I didn't come in, it might be considered as insubordination or I could be fired or. I had expressed my opinion about work hours and I had essentially been allayed that that's what I was being told to do was come in regardless. And so I came in.

TR 720 (Emphasis added). When referring to the number of hours that he worked, Tipton was referring to the limit of 72 hours in a 7-day period. TR 723.

Teresa Tipton, then estranged wife of Complainant, testified that he worked very long hours in August and September 2001, that he would leave in the morning around 6:30 a.m. and return at 7:30 p.m. TR 1786. As of September 25, she said he was "out of hours . . . ." TR 1787. Although Respondent's counsel attempted to challenge Teri Tipton's testimony regarding the conversation between Tipton and Brouwer, on the grounds that she only heard Tipton's side, she testified that Tipton "repeated what Ed Brouwer said because he was trying to be very clear about it." TR 1811. This was the "three-way communication" technique used at Cook Plant as referenced by Tipton and Stark. Tipton remained at work until at least 4:29 p.m. when he sent his last e-mail to Plant management reiterating his request for a deviation approval for his work hours.

Ms. Tipton testified that her husband told Brouwer that he was "out of hours." She corroborated Tipton's testimony that he asked Brouwer if he would check with Stark to see if he still wanted him there even though he was out of hours. Some ten minutes later, Complainant got another phone call from Brouwer stating "Mark wants you here." TR 1791. Ms. Tipton testified that the purpose of the second phone call was to confirm that Stark wanted him to come in even though he was out of hours. TR 1791. She and Tipton had talked about his working hours on the evening of September 25. He had advised her that he was over his working hours and did not plan to go into work the next day, September 26. TR 1791.

Before Complainant left for work, Ms. Tipton testified that he said words to the effect that "this is wrong, I'm not suppose to be there." TR 1802. Tipton also told his wife "I don't have approval for this." TR 1802. Tipton's testimony was consistent with what he told Brad Williamson during the investigation: that three people were present during the speaker phone conversation, he told them he was already at 72 hours and couldn't work more, Brouwer told him that he would confirm permission and would call back, that a few minutes later, Brouwer called back and told Tipton that he had talked to Rick Tinkle and Mark Stark, and a time extension would be approved. JX 37 at 29.

Turcotte testified that there was a question about whether Tipton should come in "because it was obvious that Ken was going to exceed his work hour limits if he did come in." TR 52. Chacon said that Tipton worked a lot of hours and that he said that he "had violated the work hour limits." TR 197. Turcotte's account was similar to Tipton's: Brouwer called Tipton at home at around 7:00 a.m. from Chacon's office and asked him if he was coming in. Brouwer put the call on speakerphone. Turcotte heard Tipton answer the phone, and heard Brouwer ask Tipton if he was coming in. Turcotte heard Brouwer tell Tipton:

> [T]hat he was needed to complete the procedure work and Ken said that he didn't know if he should be coming in. He said 'I'm, if I come in I am going to exceed my work hour limits. Are you sure we want to do that? Do we have permission to do that?' And Brouwer said 'I need to check on that' and he hung up and left. He came back, several minutes later and told him to come in.

TR 51-52.

I find that Tipton engaged in protected activity by refusing to report to work unless directed do so and where he believed if he did so he would violate the limitations.

2. <u>Tipton Engaged in Protected Activity by Asking his Supervisor for Approval of His Work Hours on the 26th and by his Comments at the 9:00 Meeting</u>

After Tipton came to work on September 26, he went to his office. While Chacon was in Tipton's office, Chacon heard Brouwer and Tipton talking about a letter for working hour limitations that Tipton requested. Chacon testified that he assumed that Tipton had a problem with his hours. TR 1730.

Brouwer testified that around 8:30 a.m. in Tipton's office on September 26, 2001, Tipton expressed concern about his hours. TR 332. Testifying that Tipton raised the question about work hour limitations, Brouwer said that Tipton "was most vocal about that issue." TR 334. According to Brouwer, he then brought up the topic with Mark Stark because it was a concern "to several people. Ken (Mr. Tipton) was, like I said, the most vocal. But others were also concerned about work limitations since Ken brought it up." TR 334.

Brouwer also testified that Chacon raised issues involving work hour limitations in the September 26 time-period saying that Chacon wanted to make sure that the engineers did not exceed them and that there were proper approvals. However, Tipton was "by far" the most vocal in raising concerns about working hour limitations in Brouwer's opinion. TR 446-447.

Joint Exhibit 123 at 7 provides that "an individual shall not be permitted to work more than 72 hours out of a rolling 168 hour (7-day) time frame (not including turnover time) (*<u>Regulatory Limit</u>*)." Tipton testified that this put some responsibility on management:

> Q. Did you feel that that put some constraint on you not to work more than the approved number of hours?
>
> A. I think it puts constraints on management not to permit individuals to work those numbers of hours.

Q. What about constraints on you? Did you feel any obligation on yourself to comply with the work hour limitation procedure?

A. I felt at that time *I was being told to do the job till it was complete*. And that work hour limitations were a management issue and a function of management to ensure that they didn't permit anybody to exceed them.

TR 924-925. (Emphasis added)

Respondent questioned whether the work hour limitation was an individual responsibility:

A. I would say that if my management directed me to work the hours, then they were in violation because they permitted me to work the hours.

Q. That may be. And were you in violation too or not?

A. I don't have any individual responsibilities with regard to the procedure so I can't say whether I was in violation.

TR 927.

Mark Stark, questioned at the hearing regarding Tipton's complaints about excessive work hours, testified in contradiction to his deposition. Stark initially denied that Turcotte told him that Tipton complained of being over his hours. TR 1610. However, in his deposition, he said the opposite:

Q. Well, let me take you to your deposition, see if this is correct. Page 70, line 19. Question, "Do you recall any message from Mr. Tipton while he was at home conveyed to you through Mr. Brouwer that he was out of hours?" Answer, "No. My initial contact was middle of the morning when Mr. Turcotte said, '*Do you realize that he's out of hours*?'" Do you remember that question and answer?

A. I remember the question, I remember the answer but.

Q. Is that incorrect?

A. It's a deposition, so it's a factual statement. But what I'm telling you today is that I was not told that he was out of hours. I was told that he had worked a lot of hours.

Q. Well, when you said in your deposition quoting Mr. Turcotte, "Do you realize that he's out of hours?," are you saying you were mistaken and your memory is better now?

A. I didn't say that.

Q. The “he” in the phrase, "Do you realize that he's out of hours?," that referred to Mr. Tipton, right?

A. Say that again?

Q. The “he” in the phrase, "Do you realize that he's out of hours?" referred to Ken Tipton, correct?

A. Who is making that statement?

Q. You are. You're quoting Mark Turcotte.

A. Okay. If that's what I said, that's what I said. I can't deny that I said that.

Q. When you said that in your deposition, did you understand that the ‘he’ in that quote referred to Ken Tipton?

A. When Mr. Turcotte mentioned the hours issue at the 9 o'clock meeting?

Q. Yes.

A. Yes.

TR 1610-1611.

Later in his testimony, Stark appeared to admit that Turcotte did in fact say that Tipton complained of being out of hours:

Q. Well, would you have, in your deposition, when you're quoting Mr. Turcotte as telling you during the meeting, "Do you realize that he's out of hours?" isn't that a signal to you that he's out of hours?

A. Yes, and Mr. Brouwer was asked to go figure out what the hours were of the employees and to also build a schedule for the unit to [sic] testing. So, I need to know what the

hours of the employee are before I can make a decision, good or bad.

TR 1614.

Stark then denied that he told Tipton to try to go home by noon after he heard that he was out of hours. TR 1616. The deposition read:

> Q. Do you recall this from your deposition on page 72, line 18? Question, "You told Mr. Tipton to go home, right?" Answer, "By noon." Question, "By noon. Now, that was after you heard from Mr. Turcotte that there was a problem with hours?" Answer, "Well, he, Mr. Turcotte's question was, I think, 'we're out of hours.'"….
>
> Q. So, the response would have been, "You need to figure out what your hours are. And if you're out of hours, then he needs to leave or get authorization." Do you recall that question and answer?
>
> A. Yes. That makes perfect sense.
>
> Q. Okay. And you're quoting Mr. Turcotte as saying "we're out of hours," correct?
>
> . . .
>
> A. That's what I stated in the deposition.

TR 1616-1617.

For a third time Stark quoted Turcotte about being out of hours, this time in reference to the group as a whole:

> Q. Page 73 of your deposition, question, "You don't remember Tipton saying anything about hours?" Answer, "No." Question, "Continuing, at all in September 26th?" Answer, "I don't know, John. He could have brought it up after Turcotte mentioned it. But the piece that I remember is Turcotte saying 'do you know we're out of hours?'" Okay. That's the third time. Do you recall that question and that answer?
>
> A. I recall the deposition. I mean, there was a series of statements there, so obviously I stated it because it's in the deposition.

TR 1617.

The phrase "out of hours" according to Stark meant:

Q. Was there any ambiguity in your mind when Mr. Turcotte was saying the phrase out of hours?

A. Out of hours means that, in my mind that they need to get working hour authorization to continue on.

Q. And that's what Mr. Brouwer did, correct?

A. And that's what Mr. Brouwer did.

TR 1618.

Even with all this information presented to him at the 9:00 a.m. meeting, Stark still made Tipton work his assignment on the day in question:

Q. Okay. And you still directed Mr. Tipton to work because you gave him an assignment at the 9 o'clock meeting, correct?

A. I didn't direct Mr. Tipton to work. I gave him an assignment at the 9 o'clock meeting to complete the procedure and the CREM which he stated could be done by noon.

Q. That's telling him to work, isn't it? At least until noon?

A. Yes.

TR 1619.

Stark testified that Brouwer brought a request for Tipton's time deviation late in the day on September 26. According to Stark, "Mr. Brouwer brought a form to me to sign that had retroactive time on it." TR 1620. However, the form that Brouwer showed Stark in JX 11 has no time at all listed in it. Stark had no explanation why Brouwer, having been made aware of the situation involving Tipton no later than the 9:00 meeting (according to his and Tipton's testimony before the meeting), would present a form at the end of the day as opposed to at or about the 9:00 meeting. TR 1620-1621. Tipton testified that he had discussed the issue of his working hours twice with Brouwer, who was also to discuss the deviation request with Stark or another member of management, on the phone after 7:00 a.m. and may have had another discussion in his office prior to the 9:00 meeting. TR 735. In discussing hours with Brouwer, Tipton filled out his time sheets for Brouwer sometime in the morning of September 26.

At the beginning of the meeting, Stark said something to the effect that they needed to get Tipton out of there because he was working too many hours. TR 72. Tipton assumed he must have known about the situation with the hours in talking with Brouwer after Brouwer called

Tipton the second time at home. TR 741. There was no other explanation for Stark making that comment and then assigning Tipton to close up procedure as an assignment other than that he was aware of Tipton's work hour situation. TR 742.

During the later meeting, Stark did not respond to Tipton's request forwarded by Brouwer; he simply said nothing. Tinkle, however, stated that his hours exclude turnover time, to which Tipton responded, "even excluding turnover time, I'm over my hours," meaning exceeding 72 hours in 7 days. TR 738-739. There was no further response to that comment by Tinkle. Nor was there any response by Stark after the exchange between Tipton and Tinkle. Tipton reacted by getting up and leaving to go take care of the work assignment that he was given. TR 739.

Tipton expected approval and a signed form similar to JX 11 and asked for this several times during the meeting. TR 72, 744. Significantly, Stark never told Tipton on September 26 at the meeting or any other time that he was not approved to exceed his working hours. TR 744. Stark said nothing about Tipton not being approved to work on September 26 for any length of time. He did not discuss approvals for work at all on that day. TR 745.

Later in his testimony, Brouwer was asked about statements made at the 9:00 a.m. meeting on the 26th :

> Q During that meeting, did the issue of working hours come up again?
>
> A Yes, it did.
>
> Q How did it come up?
>
> A I believe Ken raised the issue of the hours being worked.
>
> …
>
> Q And what did Ken bring up during this meeting?
>
> A Well, since you're talking about the work hour limitation, he did mention that we were putting in a lot of hours, we needed exemptions to the work hour limitation.
>
> Q Do you recall if Mr. Stark had a response to that?
>
> A From my recollection, no, I don't. But in the meeting notes that I wrote down within a day or so that I did put a note in there that said something to the effect that Mark Stark mentioned that Ken should be sent home around the noon time frame. I don't recall him saying that but since I wrote it down it's obvious that he did say something to that effect.

TR 361-362.

Tipton's evidence also includes the testimony of Turcotte who described Stark's awareness for the work hours issue by comments he made at the 9:00 a.m. meeting:

> Q Do you recall anything said by Mr. Stark regarding working hours?
>
> A The first thing that I remember him saying was the first order of business is to get Ken Tipton out of here because he's worked too many hours.
>
> Q Did you hear Mr. Tipton say anything about working hours?
>
> A He asked a couple of times during the meeting for a work hour extension form.

TR 72. Brouwer's chronological log corroborates this testimony. JX 67. His notes reveal that Ken was to be out of the office by noon.

Tinkle did not recall Stark saying anything about the work hours at the 9:00 meeting at the time of the hearing. However when challenged with his deposition, Tinkle did recall that when asked if Stark said "we've got to get Tipton out of here" he replied "yes." TR 1494. According to Respondent, the only thing Tinkle recalled Stark saying about Tipton that was there had to be a day off after the Unit 1 testing and before they started Unit 2 testing. Post-hearing brief at 56. However, this assertion is refuted by Tinkle's deposition and his acknowledgement at the hearing. While Tinkle denied Stark's comment about getting Tipton out as soon as possible, all of the others present at the 9:00 a.m. meeting confirmed this comment by Stark. TR 1457, TR 1545. In a statement drafted by Tinkle on September 26, he wrote:

> Mark Stark stated that our goal for the day was to get all of our loose ends wrapped up such that Ken Tipton would get a break due to the long hours he *had* put in this week. JX 60 at 1-2. (Emphasis added).

Tinkle agreed that by the time the meeting took place, whatever the long hours were, Tipton had already worked them. TR 1468. He testified:

> Q Having read that [Joint Exhibit 60] do you recall now that there was some discussion at the, at the staff meeting on the 26th about Mr. Tipton relating to his leaving?
>
> A Yes, I do.
>
> Q And what do you recall?

> A Again that Ken had been working a full 12 hour shift plus turnover all the way up through this test. And in order to make sure that he was going to be available for the next round or the next unit we needed to get him a break so that he received some rest.

Tinkle testified that if an employee came to him stating that he was working excess hours without a deviation request, he would send him home if he could not get an authorization immediately. He would not continue to work that individual in violation of the working hour limits without an authorization. TR 1469. Tinkle testified that the meeting Stark had in his office was considered "work" for working hour limitation purposes and lasted for about 45 minutes.

However, Stark denied that as of the 9:00 meeting he knew anything about Tipton's hours. TR 1545-1546. Stark also denied that he had any discussion with Tipton about his work hours after the 9:00 meeting. TR 1546. Tinkle specifically confirmed during the hearing that Stark made the comment "we've got to get Tipton out of here." TR 1494. Tinkle testified that he possessed some knowledge of Tipton's hours by stating:

> …Ken had been working a full 12 hour shift plus turnover all the way up through this test. And in order to make sure that he was going to be available for the next round or the next unit we needed to give him a break so that he received some rest.

TR 1459.

The evidence shows that the testing lasted eight days and according to this statement, Tinkle knew or believed that he worked all of them. Possession of basic math skills would show that Tinkle must have known that Tipton had exceeded the seventy-two hour limitations.

Respondent invested a great deal of time in its Post-hearing Brief advancing the idea that Stark was unaware of Tipton's hours status at the 9:00 meeting. However, where a number of witnesses corroborate Tipton's version and Brouwer's, I find their testimony probative. As I found Stark's credibility less probative, I accord his version of the events no weight on this issue. The facts here are similar to the facts of *Germann v. CalMat Co.*, where the employee made complaints about over-hours violations and suffered adverse employment action. ARB No. 99-114, ALJ No. 1999-STA-15 (ARB Aug. 1, 002); *aff'd sub nom, CalMat Co. v. U.S. Dept. of* Labor, 364 F. 3d 1117 (9th Cir. 2004). Consequently, I find that Tipton engaged in protected activity at this meeting.

3. Tipton Reiterates His Request for the Deviation Approval

The testimony of Tipton, Teresa Tipton, Brouwer, and Turcotte, as well as, the testimony of Stark, reveal that Tipton complained to members of management about working excessive hours. Employer admits that Tipton e-mailed his supervisor and copied to several levels of Cook

Plant management above Brouwer, including Stark, at the end of the 26th to request again the approved deviation form for his work hours. JX 16. Submitted evidence also shows that Stark, Tinkle, and Brouwer all received his e-mail. JX 16 at 2-4. I find that this e-mail, when incorporating by reference the conversations earlier in the day, constituted another engagement in protected activity.

I find that the evidence establishes that Stark, Tinkle and Brouwer all knew of Tipton's requests and that he engaged in protected activity by refusing to report to work, by complaining about his work hours and requesting a deviation request by phone from his home, with Brouwer at 8:30, several times during the 9:00 a.m. meeting with Stark, Brouwer, and Tinkle, and by his e-mail request.

c. <u>Respondent's Arguments that Tipton Engaged in Independent Action to Violate the Regulations</u>

I&M, however, avers that Tipton did not raise any safety concerns or engage in protected activity that implicated nuclear safety. (Post-hearing brief at 1, 36-42). Furthermore, it argues that compliance with the work hour limitations lies with the individual employee and, therefore, Tipton himself violated the regulatory policy. I find to the contrary on both arguments. First, the NRC has adopted the view that an employee's refusal to work due to excessive hours equates to protected activity in and of itself. CX 2 at 3.

Secondly, 10 C.F.R. Part 26 places the burden of addressing fitness for duty on nuclear plan licensees, not on employees. Licensees must "provide reasonable assurance that nuclear power plant personnel…are not…physically impaired from any cause which in any way adversely affects their ability to safely and competently perform their duties." 10 C.F.R. § 26.20(a)(2) states that the licensee policy should address factors such as mental stress and fatigue that could affect fitness for duty. The NRC's position is that these requirements incorporate worker fatigue into the mandate for licensees. (NRC Regulatory Issue Summary 2002-07: Clarification of NRC Requirements Applicable to Worker Fatigue and Self-declarations of Fitness-for-Duty (May 10, 2002)). Additionally, 10 C.F.R. § 50.7, "Employee protection", prohibits discrimination by a licensee against an employee for engaging in protected activities such as refusing to report for work due to fatigue.

Lastly, Cook Plant's own working hour limitation policy does not place the burden of compliance on the employee. Instead, the policy states that "An individual shall not be *permitted* to work more than 72 hours out of a rolling 168 hour (7-day) time frame…" JX 123 at 7 (emphasis added). This is also the wording of the NRC regulatory limit. If the employee held the burden of adherence to the policy, and the regulation, then the wording would have been that the "employee shall not" rather than that the employee "shall not be *permitted.*"

I take notice that Respondent's arguments on this issue are disingenuous in light of the September 28, 2001, Corrective Action Report ("CR") issued after Tipton's termination. JX 128. The CR states that on September 25, Tipton[15] exceeded the regulatory limit of 72 hours in a

[15] Ken Tipton's name does not appear on the CR, instead he is identified as a test engineer with the ACAD number 9764. However, prior deviation forms identify Mr. Tipton by name and by the matching ACAD number.

seven-day time frame. JX 128. It also asserts that I&M took corrective action by "sen[ding] [Mr. Tipton] home to provide time away from work and to realign work hours." However, Joint Exhibit 131 shows that Tipton worked fourteen hours on the 25th and was not sent home early despite the fact that he had already exceeded ninety hours in a 7-day period. Tipton's uncontested testimony is that he worked until 8:00 or 8:30 p.m. on the 25th. Respondent's assertions are contrary to the evidence and, furthermore, in light of the CR submitted, are patently false. Nothing in the record supports that Tipton was sent home on the 25th in recognition of his excessive hours. Were this so, then the phone calls to Tipton on the 26th, ordering him to come in to work, evince a deliberate, willful, and knowing violation of NRC regulations and Cook Plant policy on the part of management.

Alternatively, if the CR accurately portrays management's knowledge, then Tipton engaged in protected activity by refusing to report to work due to excessive hours until he was "directed" to report by upper management in derogation of the NRC's limits. If the CR is not accurate, then it constitutes a false report for the NRC and contravenes I&M's allegations that Tipton bore responsibility for not exceeding his work hour limitations by falsely claiming to have taken action instead. The CR does not state that Tipton himself failed to follow procedure and the regulations. Nor was Tipton's alleged failure to do so a factor in his termination. Instead, the CR states that the source of the condition, the suspected *cause* of the time overrun, is "per the NGG 'the Toolbox' card sections entitled High workload and Time Pressure." Additionally, the CR states that Tipton was one of two test engineers assigned to perform the ESW testing 24 hours a day, seven days a week. "He stuck with the testing until completion." Under corrective action taken, I&M submits that Tipton was sent home early. JX 128.

Then again, the submitted CR refutes I&M's arguments that Tipton did not engage in protected activity by complaining about his work hours. Post-hearing brief at 4-6. I&M contends that Tipton never complained about the excessive work hours to Stark and that Stark only became aware of his hours situation through Brouwer later in the day. *Id.* However, on the day of Tipton's dismissal, Stark approved the CR report stating that Tipton had been sent home early on the 25th and that he needed to re-set his hours. If Stark discovered at the 9:00 a.m. meeting on the 26th that Tipton was in excess of his hours, then he was also aware when signing the CR on October 5 that Tipton was not sent home early and had not re-set his hours. Yet, he signed the patently false CR. This fallacy on Stark's part undermines his credibility regarding when he discovered the status of Tipton's hours.

Additionally, I&M relies on Brouwer's testimony that he does not remember placing the second call to Tipton, or Tipton complaining about his excessive hours, and on Stark's testimony that Tipton did not complain to him about the hours. *Id.* at 6; TR 331 (Brouwer), TR 1603 (Stark). I find this argument unpersuasive. First, other testimony corroborates Tipton's version of the telephone conversation with Brouwer on the morning of the 26th, including that of Chacon, Turcotte, and Theresa Tipton. *See, e.g.,* TR 1791-1802 (Theresa Tipton). I found Mrs. Tipton's testimony particularly credible and rely on her version of the events rather than on Brouwer's lack of detailed memory.

Secondly, Stark revealed his knowledge of Tipton's hours with his comments at the beginning of the 9:00 meeting as corroborated by Turcotte, Brouwer, Sam Verma, and Tinkle.

TR 51-52 (Turcotte), TR 582 (Verma), TR 1445-1455 (Tinkle). Tinkle wrote a statement on September 26, 2001, about the day's meeting and specifically noted Stark's comment that Tipton needed to get a break due to the long hours he had put in that week. JX 60 at 1-2.

Chacon's testimony, and Brouwer's, reveal that Brouwer and Tipton discussed his work hours and lack of deviation approval prior to the 9:00 meeting. TR 1730 (Chacon), TR 332-334 (Brouwer). Because I find the testimony of Stark to be contradictory and less than credible, I find that the overwhelming weight of the evidence shows that Tipton complained about the excessive work hours and about the lack of an approved deviation form with his supervisor, Brouwer, and with Stark and Tinkle on the morning of the 26th. Additionally, I find that he also continued his protected activates later that day by e-mail, repeating his request for a work hour deviation approval. JX 16.

Therefore, I find that Tipton engaged in protected activities when he complained to Brouwer, Stark and Tinkle about the practices that violated the NRC directive not to permit work hours of employees to exceed the limitations without prior approval. Because the ERA protects an employee's internal allegations of non-compliance with regulations promulgated by the NRC pursuant to the statute, Tipton's internally made allegations of non-compliance with the working hours limitations are protected. *See,* 42 U.S.C. § 5851(a)(1).

Although the nature of Tipton's activities were intracorporate, these activities may form the basis of protected activity under *Dodd v. Polysar Latex*, Case No. 88-SWD-00004, Sec. Dec., Sept. 22, 1994, slip op. at 6-7 and cases cited therein. Tipton need not have filed a formal complaint regarding his concerns about work hours but instead met his burden by complaining to his supervisors after forming a good faith belief that the company violated safety standards under the applicable regulations. Internal complaints are protected under the ERA, *Machowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984), and an informal safety complaint to a supervisor may constitute protected activity. *See, also, Crosier v. Portland Gen'l Elec. Co.*, 91-ERA-2 (Sec'y Jan. 5 1994) (complaint about the number of hours worked equals protected activity) *Dysert v. Westinghouse Electric Corp.*, Case No. 86-ERA-39, Final Dec. and Order, Oct. 30, 1991, slip op. at 1, 3 (employee's complaints to team leader protected).

I find here, as in *Crosier* and *Dysert*, Tipton engaged in protected activity when he complained about, and notified his supervisor of, the excessive work hours and when he requested the deviation form on three occasions. He also engaged in protected activity with Stark and Tinkle at the 9:00 morning and then later in the day with his renewed request by e-mail. Although not put forth by Tipton, I also find that Tipton's initial refusal to report to work on the 26th without direction from upper management is the equivalent of protected activity. Therefore, I find that Tipton's work hours complaints, and his refusal to report to work unless compelled to do so, are protected activities. As the parties have stipulated, I also find that Tipton suffered adverse employment action.

Where Tipton has established the first two factual predicates, the remaining issue in his *prima facie* case is his proof that his protected activity was a contributing factor in the adverse action that he suffered. *See* 42 U.S.C. §5851(b)(3)(C).[16]

VIII. Engagement in Protected Activity as a Contributing Factor in the Adverse Employment Action

In *Timmons v. Mattingly Testing Services*, 95- ERA-40 (ARB June 21, 1996), the Board reviewed principles governing the evaluation of evidence of retaliatory intent in ERA whistle-blower cases. The Board indicated that where a complainant's allegations of retaliatory intent are founded on circumstantial evidence, the fact finder must carefully evaluate all evidence pertaining to the mindset of the employer and its agents regarding the protected activity and the adverse action taken. The Board noted that there will seldom be "eyewitness" testimony concerning an employer's mental process. Fair adjudication of whistleblower complaints requires "full presentation of a broad range of evidence that may prove, or disprove, retaliatory animus and its contribution to the adverse action taken." *Id.* at 5. The Board continued:

> Antagonism toward activity that is protected under the ERA may manifest itself in many ways, e.g., ridicule, openly hostile actions or threatening statements....
>
> When disciplinary action, including termination from employment, is involved, the past practice of the employer in similar situations is relevant to determining whether there has been disparate treatment, which may provide highly probative evidence of retaliatory intent.
>
> Furthermore, a complete understanding of the testimony of the witnesses, including testimony regarding technical procedures, is necessary for the drawing of pertinent inferences and the resolution of conflicts in that testimony.

Id. at 5-7 (citations omitted).

I find that the temporal proximity between Tipton's protected activity and his discharge was sufficient to raise the inference of causation in this case and address temporal proximity as the timing between the protected activity and the adverse employment action. Where shown, this

[16] The parties' closing briefs expend considerable energy analyzing whether the evidence demonstrates a reasonable inference of discrimination. The proof of a reasonable inference of discrimination is only required for a *prima facie* case. In the instant opinion, however, I have bypassed the uncontested aspects of the analytical framework of a *prima facie* case because, at this point in the proceedings, the ultimate question of liability is relevant, not Complainant's success or failure in proving a *prima facie* case. *See, e.g., Trimmer*, 174 F.3d at 1101-02. I have addressed the Respondent's refutation of two elements for clarification purposes and because some elements are relevant to the ultimate issue.

proximity presents circumstantial evidence of discrimination. *Jackson v. Ketchikan Pulp Co.*, 93-WPC-7 and 8 (Sec'y Mar. 4, 1996); *Conway v. Valvoline Instant Oil Change*, Inc., 91-SWD-4 (Sec'y Jan. 5, 1993). Findings of causation based on closeness in time have ranged from two days, (*Lederhaus v. Donald Paschen & Midwest Inspection Service, Ltd.*, 91-ERA-13 (Sec'y Oct. 26, 1992), slip op. at 7), to about one year (*Thomas v. Arizona Public Service Co.*, 89-ERA-19 (Sec'y Sept. 17, 1993)).

Respondent argues that discrimination is not demonstrated by temporal proximity due to the intervening event of Complainant's lying and failing to follow management directions regarding the Tech Databook change. In *Tracanna v. Arctic Slope Inspection Service*, ARB No. 98-168, ALJ No. 1997-WPC-1 (ARB July 31, 2001), the ARB held that temporal proximity did not always provide a reasonable inference of discrimination:

> Temporal proximity may be sufficient to raise an inference of causation in an environmental whistleblower case. *See, e.g., Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989). When two events are closely related in time it is often logical to infer that the first event (e.g. protected activity) caused the last (e.g. adverse action). However, under certain circumstances even adverse action following close on the heels of protected activity may not give rise to an inference of causation. Thus, for example, where the protected activity and the adverse action are separated by an intervening event that independently could have caused the adverse action, the inference of causation is compromised. Because the intervening event reasonably could have caused the adverse action, there no longer is a logical reason to infer a causal relationship between the activity and the adverse action. Of course, other evidence may establish the link between the two despite the intervening event. As the court held in *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 279 (3d Cir. 2000), "we have ruled differently on this issue [raising an inference of retaliatory motive based on temporal proximity] . . . depending, of course, on how proximate the events actually were, and the context in which the issue came before us."

Slip op. at 7-8 (footnote omitted), (Emphasis added).

Whether the events of September 26th suffice to operate as an intervening event, will be addressed *supra.*

IX. Legitimate, Nondiscriminatory Reasons for the Adverse Action

Where a claimant successfully establishes a *prima facie* case, the burden shifts to the employer to produce evidence that legitimate and lawful reasons existed for the adverse employment action. *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 254 (1981). Employer meets this burden by production not persuasion. *St. Mary's Honor Center v. Hicks*,

509 U.S. 502, 509 (1993). I find that I&M met their burden by offering admissible evidence that Tipton's termination stemmed from a failure to follow management directions, for lying during a fact-finding investigation, and for past performance problems. Accordingly, the issue becomes whether Tipton can show by a preponderance of the evidence that discrimination was a contributing factor in the adverse employment action.

X. Contributing Factor Analysis

The complainant must demonstrate at the hearing, by a preponderance of the evidence, that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint. 29 C.F.R. 24.7(b). The complainant need not have any specific knowledge that the respondent's officials had the intent to discriminate against the complainant, however; ERA employee protection cases may be based on circumstantial evidence of discriminatory intent. *See Frady v. Tennessee Valley Authority*, 92-ERA-19 and 34, slip op. at 10 n. 7 (Sec'y Oct. 23, 1995); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984)(quoting *Ellis Fischel State Cancer Hospital v. Marshall*, 629 F.2d 563, 566 (8th Cir. 1980)). For example, retaliatory motive may be inferred when adverse action closely follows protected activity. *Couty v. Dole,* 886 F.2d 147, 148 (8th Cir. 1989); *Keys v. Lutheran Family and Children's Services of Mo.,* 668 F.2d 356, 358 (8th Cir. 1981) (less than two months). Like most cases of discrimination or retaliation, the instant case lacks a "smoking gun" or direct evidence of discriminatory intent. *See Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 48 (3rd Cir. 1989).

Complainant argues that his engagement in protected activity contributed to Respondent's adverse employment decision in numerous[17] ways: 1) Hostility towards the regulations; 2) the Cook Plant mindset during the forced outage; 3) the temporal proximity of Complainant's protected activity and the adverse employment action; 4) fact-finding investigation results and reasons for termination are pretextual, false and disingenuous; 5) Complainant received disparate treatment from others involved in the alleged misconduct; 6) The Williamson investigation report offers evidence that the stated reasons are invalid; 7) Respondent deviated from established disciplinary procedures when disciplining Complainant; 8) the initiation of Fact-Finding Centered on Ken Tipton.

In *Marano v. Department of Justice,* the Court interpreted the burden of proof for a Claimant to show that the protected activity was a contributing factor in the adverse action taken by Employer:

> The words "a contributing factor". . . mean any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision. This test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a "significant," "motivating," "substantial," or "predominant" factor in a personnel action in order to overturn that action.

[17] Complainant specifically enumerates temporal proximity but alludes to some of the other items generally. The remainder of the listed items I raise *sua sponte* from the evidence.

Marano, 2 F.3d 1137, 1140 (Fed Cir. 1993) (citations omitted).

Only if Complainant meets his burden by a preponderance of the evidence does the burden shift to the employer to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the employee's behavior. 42 U.S.C. 5851(b)(3)(D); *Trimmer*, 174 F.3d at 1102. Preponderance of the evidence as a standard of proof requires that the party who bears the burden prove that a proposition is more likely true than not true. Although there is no precise definition of "clear and convincing," the Secretary and the courts recognize that this evidentiary standard is a higher burden than preponderance of the evidence but less than beyond a reasonable doubt. *See, Yule v. Burns Int'l Security Service*, Case No. 1993-ERA-12 (Sec'y May 24, 1995).

The claimant must show, by a preponderance of the evidence, that the proffered reasons are not the real reasons for the adverse employment action but rather that retaliatory discrimination existed on the part of the employer. *Zinn v. Univ. of Missouri,* 93-ERA-34 and 36 (Sec'y Jan. 18, 1996). The Claimant may show this discrimination, by direct or circumstantial evidence, by presenting evidence that the proffered legitimate reasons are not credible or that retaliatory motive more likely drove the adverse action.

A. <u>Direct Evidence of Discriminatory Intent</u>

The record reveals no direct, "smoking gun," evidence of discriminatory intent. The Sixth Circuit has held that direct evidence is evidence, which, if believed, "requires the conclusion that unlawful discrimination was at least a motivating factor." *See Talley v. Bravo Pitino Restaurant, Ltd.*, 61 F.3d 1241, 1248 (6th Cir. 1995) (citing *Terbovitz v. Fiscal Court of Adair Cty.*, 825 F.2d 111, 115 (6th Cir. 1987)).

B. <u>Circumstantial Evidence of Discriminatory Intent</u>

A complainant need not have direct evidence of discriminatory intent since ERA employee protection cases may be based on circumstantial evidence of that intent. *See Frady v. Tennessee Valley Authority*, 92-ERA-19 and 34, slip op. at 10 n. 7 (Sec'y Oct. 23, 1995); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (6th Cir. 1983). In retaliatory intent cases that are based on circumstantial evidence, fair adjudication of the complaint "requires full presentation of a broad range of evidence that may prove, or disprove, retaliatory animus and its contribution to the adverse action taken." *Timmons v. Mattingly Testing Servs.*, Case No. 95-ERA-40, slip op. at 10-11 (ARB June 21, 1996); *Seater v. Southern California Edison Co*, 95-ERA-13, slip op. at 5 (ARB Sept. 27, 1996); *see generally* K.C. Davis, Administrative Law, 2d Ed., Vol. 3, Ch. 16, Evidence (1980). Proof of Respondent's motive and intent are likely to be inferred from facts in the record. *Richter v. Baldwin Assoc.,* Case No. 94-ERA-9 (Sec'y March 12, 1986).

Where a complainant's allegations of retaliatory intent are founded on circumstantial evidence, the fact finder must carefully evaluate all evidence pertaining to the mindset of the employer and its agents regarding the protected activity and the adverse action taken. *Timmons v. Mattingly Testing Services*, 95-ERA-40(ARB June 21, 1996). Rarely will a whistleblower case

record contain testimony by a member of management, which would support a finding of linkage between the protected activity and the adverse employment action. Fair adjudication of whistleblower complaints requires "full presentation of a broad range of evidence that may prove, or disprove, retaliatory animus and its contribution to the adverse action taken." *Id*. at 5. Furthermore, the Board held in *Timmons:*

> Deliberate violations of NRC regulations suggest antagonism toward the NRC regulatory scheme and thus may provide support for an inference of retaliatory intent... When disciplinary action, including termination from employment, is involved, the past practice of the employer in similar situations is relevant to determining whether there has been disparate treatment, which may provide highly probative evidence of retaliatory intent.

Slip op. at 11-14.

Retaliatory intent may be expressed through "ridicule, openly hostile actions or threatening statements." *Id*. at 5. In determining whether retaliation has taken place, it is also relevant to look at past practices of the employer to determine whether there has been disparate treatment.

1. Hostility Towards the Regulations Infers Retaliatory Intent

Evidence exists in the record indicating hostility on the part of Cook Plant Management for the NRC limits on working hours. Brouwer testified that money drove management to work around the clock without breaks during the testing. He believed that economics drove management during the forced shutdown:

> Q That was an e-mail sent to you by Mr. Tinkle? (referring to CX 20).
> …
> Do you know what that refers to?
>
> A Yeah, there were several go-arounds to the Flow Balance testing or several attempts at it. A couple of them failed and we proceeded on and did one units' flow balance I think either two or three times.
>
> Q Do you know if they were working 12-hour shifts then?
>
> A Probably.
>
> Q The Flow Balance Test in September, if you could turn to Joint Exhibit 10 and tell us, if you can, when that began.

A That started on either the 18th or the 19th. And this is not real clear when the actual testing started. This just gives you the hours that they worked in that week time frame.

Q And how many hours per shift was Ken Tipton working?

A He was scheduled for 12 hours and then he worked, obviously, a couple additional hours in turnover time and doing other issues that he needed to address.

Q I believe your testimony is that the scheduling of test engineers during a test like the ESW Flow Balance Test occurs on a certain basis, correct?

…

A Certain basis.

Q Is that around the clock?

A Yes.

Q Until it's finished?

A Generally.

Q *Is there any break allowed during the testing, in that kind of test?*

A *Generally not.*

Q *Is that a requirement or was that a requirement from your management with respect to the ESW Flow Test?*

A Yes, it was. *It was an economic decision that we were going to work until we get it done so we can restart the units and make money.*

Q Did you have any discussion with your management about reconciling the number of test engineers that you had versus the requirement to perform the test seven days a week around the clock?

A I can't recall any specific discussions but I'm sure that it was brought up. Unfortunately, this test that we're talking about here on Exhibit No. 10 of the Joint Exhibit book took longer than we had anticipated because of problems we

encountered. Normally the Flow Balance Test doesn't take but a day or two.

TR 322-324. (Emphasis added).

It appears that Cook Plant management wanted the job done continuously without strict adherence to the NRC limits on hours after the testing failed. TR 341 ("The idea was that we would continue working till the job was done."). After noting that he had observed both Chacon and Tipton being tired and "beat," Brouwer was asked:

Q Did Mr. Stark raise any questions or discussions about fatigue of any of your subordinates after you raised this issue with him?

A No, he did not.

Q Did that surprise you?

A Not really.

Q Why not?

A Employees at the Cook Plant are there to do a job and your personal condition is not that big of an issue. It's more get the job done. That's why you're here.

TR 355.

The majority of the testimony supports Tipton's version that he was directed to work on September 26th in spite of the fact that he had exceeded his hours already or would be exceeding his hours if he reported. While Brouwer does not recall making the second phone call to Tipton that morning, Tipton, his then-girlfriend Teresa, Chacon, and Turcotte all testified in harmony that Brouwer told Tipton to report for duty in derogation of the NRC's limitations. Tipton testified:

Q And did you tell Mr. Brouwer that you were over the limit or that you still had a few hours left?

A I told Mr. Brouwer that I had been working a tremendous number of hours at their direction to get this stuff done, the testing, the procedure. And that I needed him to make sure that I was being told to come in. And I wanted him to go confirm that with upper management because I was concerned about my work hours.

Q Is that --

A What the approvals were.

Q Excuse me.

A I was concerned that I would be over my work hours and that there might not be approval for that.

Q Well, do you remember whether you told Mr. Brouwer that you were over your work hours or that you would be at some point if you came in?

A I think I told him that I would be if I came in and I can't remember if I told him that I was or not. Again, I didn't know at that time what the limits were. I knew there was a regulatory limit of 72 in seven days from the procedure.

TR 949.

Moreover, the evidence supports the conclusion that Brouwer went to Stark to confirm the need for Tipton to report even though he would be violating the limitations. Evidence of Stark's knowledge that Tipton needed to reset his hours comes from his statements at the start of the 9:00 meeting. Stark began the meeting by stating that Tipton needed to get out by noon, yet he then assigned Tipton the task of closing out the CREM notes for the remainder of the afternoon. JX 67, TR 72 (Turcotte), 375 (Brouwer), 582 (Verma).

Later that afternoon, he asked Tipton and Brouwer to attend a meeting with a member of management at 4:30 p.m. despite the large number of hours already worked by Tipton. TR 376. Clearly, Stark's regard for the NRC's working hour limitations was non-existent if not hostile. In addition, with regard to Stark and his refusal to sign the deviation request presented by Brouwer on the 26th, Brouwer testified:

Q Now, with respect to the paperwork in Joint Exhibit 11, was it your opinion that Ken Tipton could continue to work on the 26th without Joint Exhibit 11 being signed and approved?

A To be [in] compliance with the procedure he needed to have it signed.

Q But Mr. Stark refused to sign it?

A That is correct.

Q And with respect to Mr. Tipton, did you tell him that Mr. Stark had refused to sign it?

A At some stage, yes, I did.

Q Was that before the Tinkle meeting?

A I don't think there was no time, so, no, I don't believe I did.

Q Did you tell Mr. Tipton that he should go home since the request for excess hours deviation was not granted?

A No, I did not.

TR 345.

Further bolstering this circumstantial evidence of retaliatory intent, is Brouwer's testimony regarding absences to reset hours. He testified that any absence would have caused a delay and that would have upset management. His testimony continued:

Q And why was that?

A Because if I had told Ken to go home immediately to get his work hour limitations back in line, I would have gotten fired over that.

Q By whom?

A By management. I guarantee you I would have.

Q Why do you say that?

A Because Ken was the only person that could effectively get the paperwork done in a timely fashion and correctly since he had the test work. And without him, that process would have been delayed significantly and that would have caused a whole lot of concern on management's part.

TR 345-346.

Added evidence of Cook Plant Management's hostility against the NRC's regulations, which require pre-approved deviation forms for excess hours, is the following testimony by Brouwer concerning Stark's refusal to sign the deviation request. Brouwer expressed the work hour concern to Stark before the 9:00 meeting. TR 335. When Brouwer saw Stark, he presented a request for an exemption from the 72-hour work hour limitations in JX 11. Brouwer prepared Joint Exhibit 10 after Tipton raised the issue about working hours. TR 389. Brouwer expressed to Stark the concern conveyed by Tipton:

Q. What did you say?

A. Just the conversation was, we have been working a lot of hours. We need exemption to ensure that we don't any

further blow by the procedural requirements of the work limitations. And I did mention that we were already over.

Q. Did you tell Mr. Stark anything about Mr. Tipton's hours?

A. At that time I'm sure I did not have this piece of paper, the Joint Exhibit 10, so I just said that we were either definitely over or very close to being over on our hours.

Q. Did you mention Mr. Tipton by name to Mr. Stark?

A. I'm sure I did.

TR 336-337.

By "over" Brouwer meant over 72 hours in a week. TR 337. Stark's reaction to Brouwer's comments follows:

Q. What was Mr. Stark's response to that?

A. He didn't seem real happy to see that we had gone over on our hours and he refused to sign the form.

Q. Did you tell Mr. Stark that Mr. Tipton was in the building at work?

A. I don't recall if I did or not. I would suspect that came up, and, I suspect I told him that, since we had a meeting coming up shortly thereafter.

Q. Did you say anything else to Mr. Stark about the number of hours that had been worked by your test engineers?

A. That it was significant.

Q. Were you seeking approval for Mr. Tipton to work on September 26th?

A. I was seeking approval to have the excessive hours approved before we went any further and got further into over the hours worked.

Q. Did that include hours to be worked on the 26th?

A. Right, yes. TR 337-338.

…

A One part that I do recall clearly is that I mentioned to Mark that if he wouldn't sign it, I'd have to bring it upstairs and have Joe Pollock sign it because –

Q [Who] is Joe Pollock?

A Joe Pollock, at that time, was the plant manager of the Cook Plant.

Q Is there a designation for plant manager on the form that you presented to Mr. Stark?

A The very last line, signature line it says plant manager or designee. And since Joe Pollock was on site that day, he would have been the person to sign that for us.

…

Q Why were you going to go to Joe Pollock?

A Because he was the ultimate signature authority for that piece of paper. And I was under the impression, and I still am, that we needed that form signed to get Ken and the rest of the test engineers time approved for that day.

…

Q Now, did Mr. Stark have a response to your statement that you were going to go to Joe Pollock to get him to sign it?

A He discouraged that.

Q Did you have any response to what he said in terms of discouraging you?

A I was surprised. No, I did not pursue it further with Mark.

Q Why were you surprised?

A It's my expectation that when an issue is addressed, it should be addressed to completion. And in this case, it was a rather simple matter of, hey, if we exceed our work hour limitations, we'll take our knocks for it but we still need approval to continue working for the procedure.

Q Did you want this document signed for the continuation of the work?

A Yes, I did.

TR 350-351.

Clearly, Stark wanted Tipton at work that day, yet he did not want to sign the form. His defense that he did not want to sign it with retroactive hours included does not seem plausible when the form did not yet list the dates being covered. TR 339-341. This assertion seems even more disingenuous when confronted with the fact that Stark assigned work for Tipton on the 26th, rather than sending him home, and then directed Brouwer to begin immediately scheduling the 24/7 continuous testing for Unit 2. It is evident that Stark had no true intent or interest in meeting the requirements of the NRC. In addition, it is unclear why he did not want the Plant Manger informed of the situation with the hours. TR 349-351. Because of his refusal and his discouragement towards Brouwer in getting another management signature, the form was not signed and the NRC policy violated, if not before the 26th, then certainly on the day of the 26th. Furthermore, after sending his e-mail on the 26th, Tinkle and Stark would both have been aware that Tipton's hours could not be re-set in time for the Unit 2 testing. After working some eight hours on the 26th, in addition to the 98 hours already worked, one day of zero hours would not reset his hours to be under 72 in the previous 7 days.

Brouwer testified that he did not discuss the form with Joe Pollock. TR 355-356. He felt that if he took his concerns to Pollock, "I knew there would be some repercussions from it so I chose not to pursue that." TR 356. When asked if he had any concerns over his job with respect to this issue, he replied that he did not at that point but later on, when the investigation occurred, it crossed his mind. TR 356.

On the day of Tipton's termination, a Condition Report ("CR") was approved because Tipton had exceeded the limitations without prior approval. JX 128. However, the CR falsely stated that Tipton was sent home early on the 25th and did not address the hours worked on the 26th in violation of the limitations.[18] Brouwer testified that the CR he prepared was altered after-the-fact and that he was directed to write it by Tinkle. TR 432, 437. Tipton's name was deleted and instead only his badge number identified him. The CR falsely states that Tipton was sent home early on the 25th to re-set his hours yet he worked fourteen hours that day. JX 128, TR 437, TR 1009-1010, JX 131. This is patently false and indicates a deliberate attempt to deceive the NRC that I&M followed the limitations. As discussed *supra*, I find that this action supports the inference that Tipton was discriminated against.

[18] On cross-examination, Mr. Brouwer and counsel made statements referencing the Condition Report at Joint Exhibit 128 but using September 26th as the date. Assuming that Brouwer mistakenly dated the CR for the 25th but meant it to apply to the 26th, his comments that Tipton was sent home early, at 4:30 p.m., make more sense. However, this does not change the probative value of the falsity of the report. If it was meant to apply to the 26th then it should have reflected the discovery of Tipton's hours early in the day and he should have been sent home immediately or not asked to report in the first place. The CR states that after discovery, Tipton was sent home. This was not the case on the 26th or on the 25th.

I&M argues to the contrary, relying on the provision at 42 U.S.C. §5851 that Tipton willfully violated the policy and as such, he is barred from recovery. Forty-two U.S.C. §5851(g) provides that:

> Subsection [5851](a) of this section shall not apply with respect to any employee, who acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of this chapter or of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2001 et. seq.).

The "willfulness" exception to the applicability of the statutory protections is an "affirmative defense" for which an employer bears the burden of proof "by a preponderance of evidence." *Fields v Florida Power Corp*. 96-ERA-22, D&O of ARB, at 2 n. 3 (March 13, 1998), *affirmed sub. nom*. *Fields v DOL*, 173 F.3d 811 (11th Cir. 1999). The Secretary has narrowly construed this defense. *James v Ketchikan Pulp Co.*, 94-WPC-4, D&O of Sec'y, at 6-7 (March 15, 1996).

To meet its burden under a "willfulness" defense, an employer must meet a difficult three-part test:

1) that the act was done without direction from the employer;
2) that employee deliberately did an act; and
3) that the act caused a violation of legal requirements. *Fields, supra* at 6

In order to establish the first prong of this test, an employer must demonstrate that the employee acted with neither the express nor the implied consent of the employer. *Id*. at 7-10. To establish the "willfulness" component of the test, an employer must show that the employee has actual "knowledge" that his conduct constituted a violation or that the employee acted with a reckless disregard concerning a violation. The ARB defined the willfulness component as follows:

> [W]e find that to establish a valid Section 211 (g) defense, a respondent [employer] must show that a complainant [employee] willfully or recklessly caused a violation of the EPA or the Atomic Energy Act, that is, that the complainant acted with knowledge or with reckless disregard of whether his or her act would cause a violation." *Id*. at 14.

The facts here show that Tipton attempted to ensure that the NRC work policy limitations were followed by requesting approval of a deviation in advance of reporting to work. Thereafter, he was directed to report for work on September 26th despite his excessive hours. Admittedly, Tipton had violated the limitations prior to September 26th. However, under the facts of this case, we are concerned with the activities of the 26th. On that day, violation of the limitations occurred as a result of I&M's direction and not due to Tipton's willfulness. Consequently, Respondent does not qualify for the defense at §5851(g) due to the lack of willfulness and the direction given to report to work.

I find that here, as in *Timmons*, deliberate violations of NRC regulations, and falsification of documents relating to them, suggest antagonism toward the regulatory scheme and thus support an inference of retaliatory intent against Tipton. Where Stark, Brouwer, and Tinkle knowingly and willingly permitted, encouraged, condoned, acquiesced and most importantly, commanded that Tipton work excessive hours on the 26th, I find that Cook management evinced hostility towards the work hour limitations.

2. Cook Plant Management's Mindset

The Third Circuit held in *Doyle v. United States Sec'y of Labor*, that "a finding of liability requires an inquiry into the defendant's state of mind to prove that the defendant subjectively intended to discriminate against the plaintiff on account of his engagement in protected activity." 285 F.3d 243, 252 at n. 6 (2002), *cert. denied Doyle v. Hydro Nuclear Services*, 537 U.S. 1066 (2002); *quoting* EEOC v. Chicago Miniature Lamp Works, 947 F.2d 292, 297 (7th Cir.1991) (*citing* Intl. Bhd. of Teamsters v. United States, 431 U.S. 324, 336 n. 15 (1977). It is more likely than not that management viewed Tipton's complaints about working hours at the 9:00 meeting with hostility. The record is clear that Plant management wanted to start on the Unit 2 testing as soon as possible which meant doing preparation the next day for testing on Friday. TR 372. The testimony is uncontroverted that management implicitly, if not expressly, pressured the staff to expedite the re-startup process. This involved the embedded command to work whatever hours it took to get the job done.

According to Tipton, "the directive was to work around the clock to get the ESW flow-balance done. That was . . . put out by management even in e-mails and other items" as referring to Brouwer and Stark. TR 712. I take notice that during a prior forced outage, I&M may have suffered losses of two million dollars per day.[19] Circumstances prevailing prior to, and at the time of, Tipton's complaints cannot be overlooked.

To facilitate the startup process, Stark assigned Brouwer the task of setting up the schedule for Unit 2 testing. Brouwer testified that he scheduled the same group of employees, including Tipton, to continue around-the-clock-shifts starting September 27th or the very next day. TR 372, JX 12. Despite the excessive hours worked already, no breaks were contemplated. Where Tinkle claimed that Stark made no comment about Tipton leaving early but said to make sure that all those involved in Unit I testing needed to get a day off, I find this implausible and unsubstantiated testimony. TR 1457. Indeed, even Stark did not recall making such a statement. The testimony and written notes from the meeting confirm the opposite: that the employees were to carry on immediately into the Unit 2 testing.

The inference is clear that Brouwer, at least, believed that sending employees home or scheduling days off might result in his own termination. *Supra.* Indeed, on September 27, Sam Verma sent an e-mail saying "if I work the schedule you have" by the end of his shift on Sunday,

[19] *Fritts v. Indiana Michigan Power Co.*, 2001-ERA-33 (March 7, 2003) (noting that "the pressure to ready the reactors for restart was enormous as the cost of shutdown was approximately two million dollars a day… Thus, any delay in restarting either of the reactors was very costly.").

he would have 83 hours and asking "is this the plan". JX 22. Tony Chacon notified Management that as of September 28th, "We have a shortage of test directors now and I have also reported that I will not be available for test director after 12 noon on Saturday." Tinkle wrote to Brouwer "What happens on Sunday? The schedule shows the East header test on Sunday." JX 23. Tinkle asked Steve Papageorgiou if he could follow up and get the System Engineers qualified as test directors. He then stated "I am afraid we have another potential train wreck. It sure sounds like Tony does not plan to be here past noon on Saturday." JX 23. The e-mails substantiate the fact that no breaks were allocated to the Unit 1 test employees that Thursday despite Tinkle's assertions that Stark wanted them to be scheduled for a day off. Had the employees been off on Thursday and working their 12-hour shifts as of Friday, no one would need to re-set their hours as early as Saturday or Sunday.

Brouwer told investigator Williamson that his work group was significantly understaffed and that there existed a general reluctance to raise work hour extension issues. JX 37 at 24. Understaffing is confirmed by an e-mail sent to Brouwer on September 29, 2001, from the Engineering duty manager. CX 25. He informed Brouwer that his management made it clear that engineering staff would support the ESW testing but "They are NOT there to be test engineers." CX 25. He relayed that he had a problem with an engineer filling in for the test engineers.

Chacon confirmed the fact that Tipton routinely raised issues of manpower and workload. JX 37 at 26. It is clear that there prevailed at I&M an laborious situation involving systemic over-scheduling and excessive hours which was condoned, if not encouraged, and at the least overlooked, by Plant management. It is conceivable that Tipton's complaints and refusal to report to work in violation of the NRC's limitations touched a nerve on the morning of the 26th amongst Plant management.

Indeed, on September 27, 2001, the Plant manger's assistant e-mailed management at Cook Plant to inform them that employees were reporting time in excess of the 72 hour limit and to tell their employees to subtract their turnover time from their hours. JX 132. She stated "Joe Pollock asked me why these employees were over 72 hours" the day after Tipton complained about his work hours. An earlier e-mail from this same staff member in 2000, related that the deviation forms must be done in advance of working the hours. JX 134. As evidence that the work hours limitations were routinely ignored, the e-mail stated that "50 to 75 work deviation forms" were received weekly at Cook. She also noted that when "crunch time" comes, meaning the Friday noon deadline to enter work hours, the forms start arriving en mass. It is inconceivable that deviation requests would happen to increase in volume on the day that payroll hours were entered unless the deviation approval process was not being followed. Of greater significance is the sheer number of deviation requests per week.

In direct opposition to the e-mail maintaining that 50 to 75 deviation requests came in a week, is the testimony of Tinkle. He stated that after Tipton brought up the work hours issue, he said:

> [T]hat there had been no 72 hour deviation request process[ed] to date. And that we were still bound by that procedure, required to

> follow it if, and based on our schedule and the man power that we had available, there should not be [a] need for anybody to violate the, the work hour. TR 1456.

Based on the previous eight days of ESW testing and the "24/7" schedule, it is inconceivable how Tinkle could have believed that the 72 hour limit was not reached by any one. Although he stated that management needed to ensure that all the test engineers involved in the Unit-1 Flow Balance testing needed to get the day off before starting Unit-2, e-mails submitted by Chacon and Verma indicate that this did not happen. According to Brouwer, the preparation for the testing would begin the next day in spite of the excessive hours worked already.

I find that the atmosphere at Cook Plant included pervasive management pressure to get the Plant running as expeditiously as possible, despite the work hour limitations, and included a cavalier attitude towards over-working employees. The atmosphere supports an inference that Tipton's refusal to report to work unless directed to do so and his statements about excessive hours in front of the entire ESW staff would not have been well received or appreciated by management.

3. Temporal Proximity Between Protected Activity and Adverse Action

Retaliatory motive may be inferred when adverse action closely follows protected activity. *Couty v. Dole,* 886 F.2d 147, 148 (8th Cir. 1989); *Keys v. Lutheran Family and Children's Services of Mo.,* 668 F.2d 356, 358 (8th Cir. 1981) (less than two months). Respondent offers the failure to follow management directions and Tipton's alleged lying during the fact-finding investigation as intervening events cutting short the connection between the protected activity and the adverse action. However, I will subsequently discuss my determination that the evidence does not support I&M's assertions that Tipton failed to follow management directions or that he engaged in deceit during the fact-finding. Consequently, I find that the temporal proximity between Tipton's complaints at 7:00 a.m. on the phone, at 8:30 a.m. with Brouwer, at the 9:00 meeting with Stark and Tinkle and with the e-mail request to Tinkle, Stark, and Brouwer at 4:30, are so closely related in time to the decision to suspend and investigate Tipton that a strong inference of discriminatory intent is present. The proximity amounts to a matter of hours.

While the official decision to terminate Tipton occurred within three days of his suspension, the record presents evidence that his termination was a forgone conclusion prior to the fact-finding investigation results being revealed. JX 37 (Williamson report). Joe Pollock was furious at the delay and wanted both Turcotte and Tipton fired. JX 37 at 7. Kelly was told by Rollins and Stark at the start of the fact-finding investigation that it centered on Tipton only, despite the fact that three Cook Plant employees signed Rev 15. TR 1878.

In sum, I concur with Tipton's argument that the temporal proximity of the protected activity and I&M's adverse action against him gives rise to an inference of discriminatory intent. I also find that I&M failed to establish a legitimate intervening basis for the adverse employment action by demonstrating Complainant's poor performance record or by showing that he engaged in the misconduct listed on the termination recommendation and discussed *infra*. *Cf, Evans v.*

Washington Public Power Supply System, 95-ERA-52 (ARB July 30, 1996); *Tracanna v. Arctic Slope Inspection Service*, 1997-WPC-1 (ARB July 31, 2001). Consequently, I find that Tipton's temporal proximity argument is persuasive and probative evidence of a discriminatory intent.

4. Falsity of the Fact-Finding Results and the Recommendation of Termination

When a plaintiff's *prima facie* case is combined with evidence that the employer's articulated "legitimate reasons" are false, the evidence may be enough to allow the trier of fact to find for the plaintiff. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148 (2000); *see, also, Overall v. Tennessee Valley Authority*, ARB No. 98-111 (April 30 2000), *aff'd, sub nom*, *Tennessee Valley Authority v. U.S. Department of Labor,* 59 Fed. Appx. 732, 738, 2003 WL 932433 (6th Cir.)(unpublished); *Creekmore v ABB Power Systems Energy Services, Inc*., 93-ERA-24 (Dep. Sec. Feb. 14, 1996).

Consequently, I will discuss whether Respondent's proffered reasons for Tipton's termination are clearly and convincingly shown to be legitimate and not false. I note that normally, the burden of proof for this element shifts to the Respondent only after the Complainant shows by a preponderance of the evidence that impermissible motives led to the termination. However, where the falsity of a Respondent's reasons may represent circumstantial evidence permitting the fact-finder to rule for the Complainant, I will address these reasons and Respondent's burden here.

In determining whether an employer's proffered reasons for an employment action are pretextual, it is irrelevant whether the employer's business judgment is correct. According to the Secretary of Labor, an employer's termination decision is not unlawful although based on a mistake in conclusion about the facts. However, a decision violates the Act if motivated by retaliation. Thus, any pretext determination is concerned with 'whether the employer honestly believes in the reasons it offers,' not whether it made a bad decision." *Dysert v. Westinghouse Elec. Corp.*, Case No. 86-ERA-39, slip op. at 4-5 (Sec'y Oct. 30, 1991) (emphasis added). For example, in *Rand*, the U.S. Court of Appeals for the Seventh Circuit explained that a court "[is] not concerned with the correctness or desirability of [the employer's] stated reasons for its action" and "will not second-guess [the employer's] business decisions." *Rand v. CF Industries, Inc*., 42 F.3d 1139, 1145 (7th Cir. 1994).

I&M asserts that it fired Tipton for failing to follow management's instructions, for lying during the fact-finding investigation about his attendance at the turnover meeting and for his past performance problems. (Post-hearing brief at 3). To support its assertions, the employer provided evidence of previous suspensions and warnings regarding other instances of unacceptable conduct. In addition, Employer also provided a number of non-work related e-mails, some of them containing inappropriate material, received in Tipton's company e-mail account. (RX 5-10, 18-34). With the exception of Respondent's Exhibit 18,[20] Tipton received

[20] This e-mail, forwarded from Mr. Tipton's AOL account, involved notification of a stock split and did not contain any offensive material.

these e-mails from others including co-workers at I&M. *Id.* Employer contends that Tipton would have been fired in March of 2002, when these e-mails were discovered, for violating the Electronic Communications Policy. Post-hearing brief at 89, TR 1915-1916. I will examine each stated basis of Tipton's termination in turn.

a. <u>Lying During the Fact-finding Investigation</u>

Employer asserted at the hearing and in the Post-hearing brief that Tipton lied during the September 27, 2001, fact-finding investigation into the Tech Databook changes. Post-hearing brief at 23-25. The Recommendation of Action, however, stated that Tipton was less than forthcoming. JX 26 at 31. In responses to interrogatories; I&M stated that Tipton was fired, in part, due to a lack of candor. JX 24 at 2. Based on the declaration made in the Post-hearing brief, I will assume that "lying" is the allegation that led to this reason for Tipton's termination.

I&M contends that Bakken and Pollack, senior plant management members, initiated a fact-finding investigation to determine how the Tech Databook deviated from management directive. *Id.* These investigations are used at I&M when potential disciplinary action is being considered. TR 1558. The senior management staff also decided to suspend the security access of Tipton and Turcotte, pending the outcome of the investigation and in accordance with I&M's practices. Post-hearing brief at 24, TR 1559, TR 1474. The fact-finding investigation fell to Stark and Rollins with Ms. Kelly from human resources assigned to ensure that the conduct of the investigation complied with past practice and I&M procedures. TR 1876.

Specifically, I&M alleges that when Mark Stark asked Tipton if he was present during the turnover meeting with Tony Chacon, that Tipton lied when he denied being there. The notes made by Human Resource member, Donna Kelly, during this interview show that Stark asked Tipton "Did you have turnover meeting at 0830 with Tony Chacon & was the Tech Databook discussed?"[21] JX 71. Tipton replied "No" to both portions of the question - that he was not present for a turnover and that the Tech Databook changes were not discussed. JX 71. When asked about his role in the Tech Databook review, Tipton stated that he reviewed the revision Turcotte brought to him against the data received in procedure and signed Rev. 15 as reviewed. Stark asked "Do you know how the Tech Databook Rev 15 was changed from what was out of 0600?" (Referencing the 6:00 a.m. turnover by Tony Chacon). Tipton answered, "I know there were valves that had to be removed from [the] document prepared earlier. Mark still had to remove valves from his." When asked if he knew why the Tech Databook was changed from the 0600 version, Tipton responded "no." JX 71 at 3.

When asked if he saw the document prepared at 6:00 a.m., Tipton said that he did not and that he did not sign off as "approved/reviewer" but he did tell Turcotte to remove the values that wouldn't be throttled again. When asked if he attended any other turnover meetings, Tipton said "no" that he had been over his 72 hours and had asked Ed [Brouwer] if it was "ok to be there." Specifically stating "Ed Brouwer verified that it was ok for me to be here & he said yes. That's why I came for [the] 0900."

[21] The quotations reference a direct quote from Ms. Kelly's notes and do not represent direct quotes from the declarants.

The fact-finding team interviewed Mark Turcotte prior to Tipton's interview. JX 70. Turcotte stated, "the decisions made were my fault. I take full responsibility for it. I've already talked to the NRC. That's all I'm willing to talk about." At the hearing, Turcotte testified as follows about the 8:30 meeting:

> Q Do you recall if Tony Chacon ever relayed any information specifically to Ken Tipton about what you two had discussed during your turnover meeting?
>
> A When are we talking about?
>
> Q The 8 o'clock or 8:30 time frame.
>
> A Not that I was aware of. Like I said I may have been sitting right there. If it happened it was so unnoteworthy [sic] that I didn't make notice of it.
>
> Q Do you know if there was any discussion between Chacon and Tipton concerning the matters that were e-mailed to you in Joint Exhibit 105?
>
> A Well, my understanding was that the tech data book change was my property at that point.
>
> Q No. I'm just asking did you hear anything discussed between Chacon and Tipton that related to the topics in 105?
>
> A No. But I, I got to tell you that I related to Mr. Tipton that the plan was for him to review and close out the procedure and write the CREM notes. And he already knew that and he was already starting on it so.
>
> Q That was your understanding of his assignment?
>
> A That's right.

TR 69-70.

Brouwer described the 8:30 meeting as "less" formal and atypical for a turnover:

> Q Do you know what was discussed between Ken Tipton and Tony Chacon at the meeting that occurred prior to your discussion with Mr. Stark?

A Pretty much the issues that are addressed in Tony's e-mail of 6:53 a.m. on that day.

Q Did you have any understanding as to whether there was effective or ineffective communication between those two?

A No.

Q Did you have any concern about whether Ken Tipton was receiving the message from Tony Chacon?

A No, I don't. It was very busy there. There was a lot of commotion going on.

Q Describe the commotion.

A Tony was talking. There was dialogue between Tony and Ken. Mark would throw in a few comments now and again. Ken was booting up his computer. The phone started ringing, which we probably stopped that. But, no, there was a lot of activity going on at the start of the day.

Q *Would you describe this as a typical turnover?*

A *What we were doing? Probably not.* It wasn't quite as formal because, again, Tony was in a rush to get out of there. Ken was trying to get other things going. But other than that, the information presented was what you would expect at a normal turnover. But it was done in a much quicker fashion with more commotion going on.

Q Was it more formal or less formal than a typical turnover?

A Less.

TR 360-361. (Emphasis added).

At 6:15 p.m., Stark asks Tony Chacon "Turnover 8 or 8:30 you stated Mark, Ed, you & Ken were there. Tell us who was there?" Tony stated that Tipton, Turcotte and himself were there but he was not sure how long Brouwer was there. When asked if he talked about the turnover with Tipton and Turcotte, Chacon said that Turcotte had a copy of the Tech Databook in his hand but Tipton did not. He also stated that Tipton told him to remove several valves and he assumed that Tipton would "take the lead." JX 73. On September 28, 2001, at 6:30 p.m., Chacon wrote this statement:

> At approximately 0830 HR 9/26/01 a turn-over meeting was held in Ken Tipton's office. Mark Turcotte, Ken Tipton & for an unknown period of time, Ed Brouwer were in attendance. Mark sat next to my left, Ken was in his "chair" & Ed was standing in the doorway. We discussed ESW turnover procedure req'mnts.

JX 74.

Chacon testified at the hearing regarding the alleged 8:30 turnover meeting in Tipton's office as follows:

> A … Basically *we were not doing the face to face turnover because Mark Turcotte had, had my turnover already* and, and I would have assumed he was part of this, this work doing these changes during the day. So we were trying to get Ken up to speed on what, where we were with this turnover.
>
> Q Okay. You also attached to this statement the e-mail you had sent to Turcotte earlier that day?
>
> A Yes, I did.
>
> Q Did you go over these items in your turnover meeting with Tipton?
>
> A As I recall it was rather brief. Of course, Ken knew that we had to close the procedure and he was our supervisor for quite a long time and I, I, I obviously would bow to his expertise on anything he said and did. But, yes, I, I told him we had DIT. I told you that, I mean I also had, I gave him a copy of the tech databook and I was under the impression when I left that he basically knew what had, what had to be done during the day. (Emphasis added).

Clearly, Chacon considered the 6:00 a.m. turnover meeting "*the*" turnover and therefore, it is not only conceivable but also probable that Tipton, aware of that morning's turnover between Turcotte and Chacon, did not consider the 8:30 meeting a true "turnover. It was Chacon's practice to e-mail a written version of information exchanged at his "formal turnovers yet he did not e-mail Tipton on September 26, 2001. TR 1716. Chacon also testified that the discussion with Tipton lasted only two to three minutes. TR 1714. Additionally, he stated:

> Q Okay. And is it fair to say that whatever turnover you had with Ken Tipton it wasn't the same type of turnover that you had with Mark Turcotte?

A. I would say that was fair to say.

Q It was very brief, correct?

A Yes.

Q And it occurred quite fast?

A Yes.

Q When you first saw Ken he was asking for that letter or was that later in this meeting?

A It was during the meeting while we were trying to do this turnover.

Q Was that in your opinion from what you observed Ken Tipton's primary issue?

A Yes.

Q I believe you also testified that you thought Ken Tipton was distracted by various things?

A Oh, I, I believe I said he was distracted by trying to get this letter from his supervisor that was outside the meeting.

Q And were Ken and Mark Turcotte talking with one another?

A. I don't recall them, any conversation between them.

Q You saw Ken and Mr. Brouwer talking with one another, correct?

A Right.

Q And Ken seemed to be fixated on this working hours issue, correct?

A For some of the time there, yes.

Q Now you had had a turnover with Mark Turcotte at, right around 6:00? 6:00 to 7:00?

A Uh-huh.

Q A.M., correct?

A That's correct.

Q But normally you only had one turnover during a shift change, correct?

A That is correct.

…

Q And at that point you still thought that Ken Tipton was going to be leaving?

A I didn't know what he was going to be doing, no.

Q Did you say that I've given Mark Turcotte the turnover?

A Probably. I, I don't remember those exact words but as, as I recall the, the thought was that Mr. Turcotte had the, the lead of this if you will because Ken would probably be tying up some of the loose ends to do the JOA close out that he was more familiar with than, than Mark Turcotte. It was kind of my thinking anyway.

Q If you said that that would have been because you thought Mark Turcotte was doing the turnover items in the e-mail that you had itemized, correct?

A I'm sorry. When was I supposed to have thought that?

Q Did you say that, well, let me back up. Did you say that you gave Mark Turcotte the turnover?

A Yes, I did.

Q Okay. And the reason you said that is because you were giving the turnover that was in the e-mail that you had made out to Mark Turcotte, correct?

A No. I don't want to say just yes or no. I think you need to clarify what time period we're talking about.

Q This is in Ken Tipton's office.

A Okay. Ken Tipton's office you're, you're asking me now if I, if I alluded to the letter is that what you're saying?

Q But you said I've given Mark Turcotte the turnover.

A Okay. So I, I told Mark, Ken that we had a DIT coming and he thought that was fine. That we were going to resolve a problem with a -- condition with design information transmittal. And then I also recall him not wanting those valves in the tech databook and he seemed to be quite positive this is what we had to do and I wasn't worried about him needing, a very, anymore detail than, than we had, he had no more need for a preemptive scenario than I did when I invented this, how to close out the procedure.

…

Q Okay. And in fact you didn't see any need for Ken to have a turnover did you?

A Well, I wouldn't say that. It, I couldn't go home until I had one so yeah, I wanted to have him have a turnover so I could go home.

Q Okay. Let me just refer to the deposition again where we had this Q and A to page 37 line 15. Normally in turnover you do send an e-mail to the person to whom you're turning over, correct? Answer: Right. Question: You had done that already with Mark Turcotte? Answer: Well, and I had the assumptions that Mr. Turcotte would handle that update of the tech databook and he gave the verbal. But like I said I was under the impression that Ken would not be there the rest of the day. I didn't see any reason for him to be there and he didn't need this turnover. Do you recall that testimony you gave at the deposition?

A No. At what time was I, I thinking those thoughts was that at the meeting with Mr. Turcotte? Well, see, when, when I gave the turnover to Mr. Turcotte and Mr. Tipton was not going to be there then I would have assumed that Mr. Turcotte could handle the job or ask for help during the day to handle that job.

From Chacon's testimony, it is clear that he considered his "formal" turnover to have been given to Turcotte, not Tipton. Secondly, Chacon discussed the day's work with Tipton in order to keep him "up to speed" in a general sense for closing out the ESW Testing and not specifically with the intention of turning over the day's assignments as related to the Tech Databook. Third, Chacon himself believed that Turcotte would be doing the work as addressed in his formal "turnover" e-mail. There is no indication that Chacon believed that Tipton had

received the specific, formal turnover relating to the Tech Databook change as alleged by the fact-finders. Lastly, based on his investigation interview with Chacon, Williamson concluded, "There was no turnover meeting as such at 0830." JX 37 at 27.

The facts show that Tipton and Chacon had been turning over to each other at the beginning and ending of their respective shifts in the preceding test days. In support of this contention, I note Complainant's Exhibit 24. Exhibit 24 is an e-mail sent on September 24, 2001, to all those involved in the Unit 2 ESW testing. CX 24. The following direction is included: "Once testing begins, turnovers are expected to occur in the field to minimize delays for critical path activity. Meet at 0600 & 1800 by the shift manager's office." From this memo, it is clear that a normal turnover occurred at the beginning and ending times every 12 hours. This is the typical turnover during testing that Tipton asserted he did not engage in with Chacon on September 26th.

This normal turnover between these two did not occur on September 26, 2001. Consequently, Tipton may have had several valid reasons for answering the fact-finders' questions about attending the turnover with Chacon with a "no." First, he was not present at the end of Chacon's shift. Second, Turcotte was already in receipt of the turnover and was reviewing the procedure. Third, Chacon was aware that Tipton did not intend to be in on the 26th. If so, then he engaged in no dishonest conduct, nor was he less than forthcoming.

Respondent argues that Tipton was, at the least, less than candid during his interview where he withheld information from Stark and Kelly. Post-hearing Brief at 58-59. At the hearing, Tipton testified that he heard Chacon and Turcotte discussing the Tech Databook change. TR 977-978. Respondent notes that Tipton did not relay this information when asked by Stark if he was present at the 8:30 a.m. turnover where the Tech Databook was discussed and contends that this is the equivalent of less than candid behavior. JX 71 at 1; Post-hearing Brief at 59. Tipton denied to Stark knowledge of why the Tech Databook was changed from management's directive at the 9:00 a.m. meeting but testified at the hearing regarding why Rev 15 was not a change in management direction. JX 71 at 1; TR 2006-2008; Brief at 59.

In Respondent's opinion, this contradiction between Tipton's responses to Stark and his testimony at the hearing equates to less than candid behavior and therefore, justifies his termination for lying. Brief at 58-59. I disagree. First, a failure to elaborate on his answers is not the equivalent of lying. The stated basis for Tipton's termination included the fact-finding that Tipton lied, not that he failed to elaborate or to fully comment. At the time of the fact-finding interview, Tipton may not have considered why the Tech Databook was a change in management direction and additionally, he may have answered the question in light of the management direction *he* received rather than of those given to others at the 9:00 a.m. meeting. Second, he may also not have known because he did not think it was completed in contravention of management directions. Third, the initial question posed to Tipton included the term "turnover" which may have influenced his view of the question even after it was broken into separate parts.

Therefore, I reject I&M's assertions as unsupportable and furthermore, I have previously addressed the issue of shifting explanations for Tipton's termination according to I&M.[22] I note that shifting explanations for the adverse action may denote that the declared legitimate reasons are pretext. *Fabricius v. Town of Braintree/Park Dept.,* 1997-CAA-14 at 4 n.10 (ARB Feb. 9, 1999). Here, I&M has veered from "less than candid" to "failure to cooperate" to "less than forthcoming" to "lying" as stated reasons for the termination. In consequence, I reject I&M's assertions and find that these varying accounts lend more support to an inference of discriminatory intent than to legitimizing I&M's stated reasons.

In sum, the facts are at most ambiguous as to Tipton's responses during the fact-finding investigation. Based on the evidence, I find that they do not rise to the level of lies or a lack of candor where Tipton did not have an 8:30 turnover in the true sense of the word as he was asked. The evidence establishes that Respondent's "investigation" of Tipton, and the resultant interviews, were orchestrated by Stark, acting in concert with Rollins and Molden, in such a way that Respondent could justify Complainant's termination. During his interview with Brad Williamson, Stark said that Ken Rollins reviewed the investigators' package and made the determination to change from "no problem" to lying. JX 37. Consequently, I find that this proffered reason is false and presents evidence supporting Tipton's claim.

b. <u>Failing to Follow Management Instructions Regarding the ESW Testing and Tech Databook Change</u>[23]

Employer argues that Tipton's termination followed his failure to adhere to the directions of management with regard to the Tech Databook update and that this constituted a legitimate reason for his termination. Post-hearing brief at 23. The specific assertions however, vary in the record. In the Respondent's Post-hearing brief, I&M alleges that the evidence "inexorably compels the conclusion that" Tipton deliberately failed to follow specific work instructions. Post-hearing brief at 56. I&M states that Tipton understood management directions, to wait for the DIT and to use the Chacon draft, yet deliberately chose to contravene them and failed to inform management of his change in direction. I&M further contends that Tipton's actions led to a delay because the "valve play issue was not timely resolved, thereby delaying the restart of the Cook Plant." Brief at 59-61. The fact-finding investigation, according to I&M, confirmed that Tipton failed to follow directions and to notify management about the change in directions. Brief 60-62. In support of their termination decision, I&M cites to AEP's Employee Handbook listing "willful disobedience, insubordination, and failure to carry out any reasonable order" as grounds for disciplinary action. Where Tipton had previously been suspended for failing to follow directions regarding test overruns, I&M contends that this conduct represents a repeat of unacceptable behavior, thus warranting termination for his second offense.

---

[22] Based on the declaration made in the Post-hearing brief, "lying" is the assumed allegation that led to this reason for Tipton's termination.

[23] During opening statements, I&M's counsel listed three "valid reasons for Mr. Tipton's termination: "the first is that he…ignored management direction and pursued another path *without providing notice to management* of his decision to change direction." (Emphasis added). However, in the post-hearing briefs, Employer argues that this reason for Mr. Tipton's termination stemmed from his failure to follow directions rather than his failure to provide notice.

In I&M's response to Complainant's Interrogatories, JX 24, Tipton asked for clarification regarding the claim that he ignored management directions, specifically, what directions were given to him, and by whom, and to clarify how his actions caused a delay in the restart of Unit 1. JX 24 at 3. In response I&M stated:

> Mr. Stark assigned Mr. Turcotte to complete the TDB change after receiving the Design Information Transmittal (DIT) incorporating valve tolerances from the Engineering Department. Mr. Tipton, dayshift testing engineer responsible for conducting the ESW Flow Balance Test, was assigned to close the work package procedure for the ESW Flow Balance Test after the TDB change had been processed. At the close of this meeting, Mr. Stark asked those attending if they understood their assignments. Mr. Tipton did not express any disagreement with nor any lack of comprehension of his assignment.

I&M blames the processing of the Tech Databook pre-DIT revision in leading the Maintenance Department to believe that all necessary actions to restart Unit 1 were complete when, in fact, another revision to the Tech Databook was required. JX 24 at 4. It is the compilation of the second change that caused the delay, according to Respondent.

In opening statements, I&M asserted that Tipton ignored management direction and pursued another path without notice to management. TR 16-17. However, in supervisor Brouwer's written warning letter regarding this issue, he was admonished for failing to "ensure that the Tech Databook, Rev 15 was updated based on the Tech Databook draft [prepared by Mr. Chacon]. In this situation, you signed off as the "approver" without verifying whether or not the information in the Tech Databook was correct." JX 25. There is no mention of a delay or of failing to follow management directions, even though Brouwer was also present at the meeting when Stark gave the direction regarding the update. Additionally, the fact-finding investigation leading up to this disciplinary action did not address the accuracy of Rev 15 as submitted, so it is unclear where this particular item came from or how it is justified.

The fact-finding investigation reveals a somewhat different story. Kelly's "Just Cause Checklist," used to justify disciplinary actions and document investigatory findings, states that Tipton signed the Tech Databook as "approver" when the information was not correct. JX 78. On the same page she also notes that Tipton signed a document as "reviewer" and as such, he was supposed to ensure the accuracy of the document he signed. However, nothing in the investigation challenged the veracity of Rev 15 or of the data reviewed by Tipton. Kelly then attempts to justify the current discipline on the previous suspension for failing to take responsibility for assignments. JX 78 at 10. The checklist asks if it was possible for the employee to achieve the desired conduct to which Kelly wrote: "Ken needed to stop the process & seek clarification relative to the TDB." JX 78 at 14. Yet in all interviews by the fact-finding team, the unanimous assessment was that Turcotte, not Tipton, received the assignment and responsibility to do the Tech Databook. No one interviewed by the team contended that Tipton received this assignment. Indeed, I&M stated in their response to Complainant's interrogatories that "Mr. Stark assigned Mr. Turcotte to complete the TDB change." JX 24 at 3.

Initially, the investigation team began their interviews by stating that the subject of the investigation was "the failure to complete the Tech Databook in [a] timely fashion after original draft prepared at 0600 hours." RX 1, JX 71. The fact-finders developed a possible disciplinary action recommendation on September 27, 2001, stating that Tipton failed to timely complete the Tech Databook after the original draft was completed at 6:00 a.m. JX 26 at 1. Thereafter, on October 2, 2001, members of Cook Plant management recommended termination of Tipton based on the investigation results. JX 26 at 31. The stated reasons are that Tipton reviewed Rev 15 without ensuring that "the required information" from the Tech Databook draft was included - meaning the +/- two turns as expected by Chacon. The document goes on to say that at the 8:30 "turnover meeting" with Brouwer, Tipton, Chacon and Turcotte, Ken Tipton "received directions" on how to complete a job assignment regarding the Tech Databook. In consequence, the investigation determined that because Tipton signed the book as "reviewer," that he approved a change to the plant Tech Databook that was inconsistent with specific directions from his management and without notifying AEP management. Lastly, the recommendation states that his failure to follow explicit directions caused a delay in the restart of Unit 1.[24] JX 26.

I&M presents conflicting descriptions of Tipton's alleged misconduct relating to the events of September 26, 2001. First, the initial concern prompting the investigation seems to be a perceived delay in the restart of Unit 1 due to the two-step update of the Tech Databook. From there it appears that the focus turned to the question of failure to use the Chacon draft and then, why management directions to use the DIT before completing the update were not followed. There also appears in the record the assertion that Tipton "falsely" signed off as reviewer of the Turcotte draft without incorporation of the Chacon "+/-"two turns. In the "Should Do Checklist" utilized by the fact-finders, the statement that Tipton "did not cooperate" during the investigation is listed as a performance standard violated. JX 26 at 11.

Shifting explanations for the adverse action may constitute an indication that the asserted legitimate reasons are pretext. *Fabricius v. Town of Braintree/Park Dept.,* 1997-CAA-14 at 4 n.10 (ARB Feb. 9, 1999). Here, I&M has veered from "less than candid" to "failure to cooperate" to "less than forthcoming" to "lying". The other reasons given for his termination have ranged from "failing to follow management directions", to "failing to obtain approval to change direction", "failure to seek clarification", to "causing a delay in the restart process", to "approving Rev 15 that was not based on the Chacon Draft", to "failing to ensure that Rev 15 contained the information from the Tech Databook Draft" and for "approving a change to the plant technical data book that was inconsistent." I find that these shifting explanations weigh in favor of a finding that I&M's stated reasons are pretextual.

I will next review the evidence surrounding these issues and will then discuss I&M's allegations.

Ed Brouwer testified that at the September 26, 2001, 9:00 a.m. meeting Turcotte, not Tipton, received the order to finish the Tech Databook:

[24] The allegation of Mr. Tipton's lack of candor during the investigation was also addressed and will be discussed under the appropriate section of this opinion.

Q Did Mr. Turcotte have an assignment?

A Yes, he did. That's Item No. 1 there.

Q And what was that assignment?

A It says here to update the Tech Databook. Mr. Turcotte's name is behind that.

TR 364.

As further confirmation of this testimony that Turcotte was responsible for the Tech Databook change, Brouwer's notes from the meeting corroborate that Turcotte received the assignment, not Tipton. JX 12. Brouwer also acknowledges overseeing Turcotte on this task. TR 368. During Brouwer's initial fact-finding interview, according to the written notes, this discussion:

Mr. Stark: When did you first see or hear of Tony Chacon's written email turnover on Tech Data Book status and required actions?

Mr. Brouwer: He told me in the 0800 turnover meeting that he had sent it out and no I haven't read it. RX 1 at 1.

Mr. Stark: Who did you assign the Tech Data Book Revision to and what were your instructions to them?

Mr. Brouwer: That [illegible] of took place between Tony and Mark Turcotte and then again with Ken Tipton and then after the 0900 meeting with you, Mark. Turcotte clearly, exclusively got the action from Mark Stark to complete [the] Tech Data Book Revision. RX 1 at 3.

Mr. Stark: Was it clear to you that the Tech Data Book change had been made in draft form ready for review?

Mr. Brouwer: Of course, Mark Turcotte was walking around with it in his hand during the morning after turnover.

RX 1 at 2.

Stark also testified that he assigned Turcotte the responsibility of updating the Tech Databook. TR 1536, 1629 (Turcotte had responsibility for the Tech Databook change issue from the time he set foot in the plant until he left). He assigned Tipton the closing of the ESW procedures and the CREM for the job orders. On September 26, 2001, Rollins and Stark

attended a meeting regarding the Tech Databook and Stark submitted the following signed statement: "Mark Turcotte state[d] that he had decided to make changes to the as the information was not correct." JX 65. During the investigation team's interview with Turcotte, he told Stark that he took full responsibility for the change. JX 70.

According to Turcotte, Stark assigned the Tech Databook change to him at the 9:00 am meeting as follows:

> Q During the meeting that you had with Mr. Stark at 9:30 were assignments held out?
> …
>
> A Yes.
>
> Q What were they? Do you recall?
>
> A I was assigned to do the tech data book change. And I acknowledged that I had received the turnover from Tony. And stated that there were some problems with it that I was correcting. And was told to have that done by noon.
>
> Q Who told you to have it done by noon?
>
> A Mark Stark.
>
> Q Had Mark Stark given you deadlines before?
>
> A …we were a schedule driven organization so it's not unusual to get deadlines.
>
> Q Did you consider this a hard deadline?
>
> A Yes.

TR 83-84; *see, also* JX 20.

As for Tipton, Turcotte stated, "And Ken Tipton was assigned to finish reviewing the procedure and write the CREM notes, they call them CREM, I really don't know what CREM is, an acronym for C-R-E-M. But it's a, it's the maintenance file in the computer and it's just a synopsis of what happened during the test." TR 85.

Turcotte explained that he made the decision to change the Tech Databook pre-DIT and cleared this with Brouwer, his supervisor. *See* TR 488. The evidence also shows that Turcotte left a message for Jim Phelan that "plans had changed" but the two did not talk. JX 37 at 62. Tipton did not participate in this decision. When asked if his deadline of noon changed when the DIT did not materialize as expected, Turcotte testified:

A No. I, I processed the tech data book change with all of the information that was verified as true by noon. And I --

Q When did you complete, I'm sorry, go ahead.

A I verified that course of action with Ed Brouwer, who was my supervisor, and we determined that it was the right way to go. And we knew that we would have to do another change if and when the engineering document was approved. But us doing it this way got the hard work out of the way.

TR 91-92.

Furthermore, Turcotte relayed his reasoning in doing a pre-DIT change to Brouwer prior to his approval and Brouwer's testimony confirms this. TR 488. In Turcotte's opinion, using the Chacon draft would have incorrect. When asked if anyone ever challenged what he did in Joint Exhibit 13 (Rev 15), as incorrect, Turcotte replied "No. As a matter of fact several people told me it was the right way to do it." TR 87. He also testified regarding Tipton's role in the change:

Q Looking at Joint Exhibit 13 do you know when you completed that and had it ready for signature?

A Ed signed it probably about 12:30 and then I brought it up to the document control center and it was issued and distributed.

Q Did you first bring it to Mr. Tipton?

A For his review. He signed the review.

Q Did you have any discussions with Mr. Tipton about that?

A I informed him that if and when the engineering document came through we would be doing another revision to it.

Q Do you know if Mr. Tipton checked your work?

A He did.

Q Did he look at Joint Exhibit 109?

A Yes, I believe he did. He looked through the procedure to make sure I got the right numbers.

Q Did he then sign it?

A Yes. Well, he maybe corrected a few typo type errors and then he signed it.
…

Q Did you then present Joint Exhibit 13 to Mr. Brouwer, your supervisor?

A Right. That's right.

Q And he approved it?

A Yes.

Q Did you and Mr. Brouwer go through the issues that you had gone through between yourself and Mr. Tipton?

A I told Ed how I processed the change and I recall that he walked down the end of the hall toward Mr. Tipton's office probably to verify that the numbers were right or something. But he signed it within a couple minutes.

Q Did you explain to Mr. Brouwer your rationale for producing Joint Exhibit 13 at the time that you produced it?

A Yes, I did. I did, I talked to him before I did it and then I talked to him when it was done.
…

Q I believe you testified that you explained to Mr. Brouwer what your reasoning was for what you were doing and the timing, is that correct?

A Well, let me put it this way. He signed the approved for use blank and he was aware of what I did. I don't believe he would approve it unless he approved of the manner it was done also.

Q Did he sign it after your explanation to him?

A Yes, yes. He was fully aware.

Q Did you make Mr. Brouwer aware of the issue involving the DIT and the plus or minus two turns?

A Not in great detail but he was aware that we were waiting for the DIT and that it was the plus or minus two turns issue and that we were ready to pull the trigger on that change if and when the DIT came through.

Q Why didn't you simply wait to do Joint Exhibit 13 until you got the DIT?

A Because I had instructions to get it done by noon, number one, and by number two, I can't put information into this tech data book that's not verified to be factual because that would be in violation of procedures and probably illegal.

Q Now had Tony Chacon's draft that he handed off to you dealt with this play, this plus or minus two turns play in the hand wheel turn?

Q When you got this draft from Tony Chacon could you sign this?

A No.

Q Why couldn't you sign this?

A Because it's, it was not correct. It was, besides the inaccuracies in the valve numbers this plus or minus two turns had no basis and that changes the whole point of the valve positions.

TR 95-101.

To summarize Turcotte's testimony, he had sole responsibility for the Tech Databook update; he received approval from his supervisor to make the change pre-DIT in order to meet his noon deadline; Tipton's role in the update consisted of acting as reviewer of the listed data, and to follow management's expectations by using the Chacon data would have been incorrect at best[25] and possibly even prohibited.[26]

[25] Turcotte testified that a discrepancy on the data sheet existed between the recorded position for the valves and data with the actual as-left position of the valves during the test transposed. In addition, extraneous valves that were not throttled were included in the Chacon draft. TR 63-67.

[26] Brouwer testified regarding the incorporation of the tolerances that adding them in did not ensure adequate flows unless more testing is conducted. The purpose of the ESW testing is to get representative numbers of what is needed to ensure proper flows to the various components. TR 490. According to him, the numbers used in rev 15 came directly from the procedure and gave the proper configuration for the valves to achieve the desired flows. TR 490-491. Turcotte believed that flow verification, not valve turns, actually demonstrates proper flows. Consequent-ly, incorporation of the tolerances does not ensure that the valves are verified to be in the correct position as required by

When asked about assignments made at the 9:00 a.m. meeting, Tipton testified that Turcotte received the Tech Databook update with a noon deadline. TR 746. He also stated that he was not assigned any portion of that work but acknowledged that he knew the DIT had not been issued at the time he reviewed Turcotte's Rev 15. *Id,* TR 771, 1019-1020. During his testimony, Tipton outlined the reviewer role he played in the production of the pre-DIT Rev 15 Tech Databook update submitted by Turcotte. JX 13. He testified at length regarding his role as reviewer, the nature of the changes involved in making the Tech Databook update a two-step process (one pre-DIT and another post-DIT) and the reasons that Chacon's draft could not be utilized as management requested:

> Q And if you could look at Joint Exhibit 13?
>
> A Yes, I have Joint Exhibit 13.[27]
>
> Q Okay. Is your signature on that? On page 2?
>
> A Yes, on page 2 my signature appears on the reviewed by sign off at the top of the page.
>
> Q Okay. Now I believe you testified that the technical databook change was not assigned to you at the nine, nine-thirty meeting?
>
> A That's correct.
>
> Q So could you explain to us how it came to pass that your signature ends up on a document that deals with the technical databook?
>
> A I was asked by Mr. Turcotte to perform the function of the review at his request in order for him to process this technical databook change which I did fulfill that function.
>
> Q Did that differ than the role that Mr. Turcotte had with respect to these two exhibits?
>
> A Well, he was the initiator. He prepared the change and I reviewed it against the, this was a, if you go back to page 1 of this exhibit, it indicates that this is a data presentation. Page 1 is the cover sheet for this form and it says in that, in number 1 at the third check box, it says the document is a

---

the Tech Specs. He relied on 10 C.F.R. 50.59 in asserting that without the flow verification, addition of the tolerances amounts to a design configuration that should be evaluated for consistency with the Cook Plant's licensing basis.

[27] This is the first change as initiated by Mr. Turcotte, reviewed by Mr. Tipton and approved by Mr. Brouwer. It was completed without incorporation of the DIT justified tolerances.

data presentation actual formation and review of data is controlled by procedures or programs that ensure that no NRC approval is needed. So I reviewed this as a data presentation.

Q Now what is the relationship, if any, between Joint Exhibit 13 and Joint Exhibit 59?

A Joint Exhibit 59 was a draft, I believe, prepared on night shift by Tony Chacon and turned over to Mark Turcotte in the morning of the 26th to complete. And I know Mr. Turcotte took the draft from Mr. Chacon and he reviewed Mr. Chacon's work and asked me some questions too and he was [sic] determined that there were some errors in this draft that needed to be corrected. And Mr. Turcotte corrected the errors and made, produced Rev 15, a new draft Rev 15 that eventually got approved.

…

Q Okay. So how did you fit into this portion of the technical databook change?

A I reviewed the Mr. Turcotte Rev 15 against the performed ESW procedure to verify that the valves and the positions were correct as presented in the procedure.

Q Are those the so-called data sheets?

A They are data sheets in the procedure that those positions are reflected.

Q Did you compare those?

A I compared them. Mr. Turcotte compared them and I compared them. I believe Mr. Brouwer even compared them.

Q Were you checking Mr. Turcotte's work or vice versa?

A I was checking Mr. Turcotte's work.

Q As a reviewer?

A As a reviewer.

Q Okay. And then on the Chacon draft which is Joint Exhibit 59, you mentioned something about errors?

A Yes. The positions that Tony had on here didn't match what was in the procedure.

Q ... Do you know what the errors were?

A Yes. One of the easiest to see ones is that the approved Rev 15 does not contain valves 1-ESW-115 and then the ones below that which would be 109-305-307-243-306 and 308. That's one difference. The other difference is --

Q Let me hold you there. What is the significance to you of those items being on Joint Exhibit 59?

A These valves were previously throttled and there was a design mod that was performed that replaced, I'm sorry, that placed an orifice plate in these lines such as these valves were no longer throttled. So they shouldn't be on this table anymore since they're no longer safety related throttle valves. They were not going to be throttled in the future and it could ultimately cause a configuration documentation problem because they might be reflected in one position here and reflected in another position say in a valve line-up in the SOP or some other document. So these no longer would be throttled based on design mod. They should come out in this revision.

Q And what was the significance of omitting those items that you mentioned at the bottom of that first block on Exhibit 59?

A I think it's stated that it would cause, to leave them in here it would be confusing because they were no longer required to be throttled and it's possible that if they were mentioned in the other documents that the throttle positions could be contradictory or could become contradictory. They no longer belonged on this table. And I think what happened here probably is Mr. Chacon took Rev 14 of the tech databook figure 1-19.8 and made some changes to it but did not realize that those valves should no longer be on there.

Q Was that an error on the part of someone?

A I'd say it's oversight on the part of Mr. Chacon.

…

Q Okay. Were there other errors committed by Mr. Chacon?

A Yes. Valve 1-WMO-733, which is the first valve on both tables, the positions do not correspond in the flow-balance position column, the number of turns are not the same.

Q In order to properly fill out Joint Exhibit 59, is there a document that you must have in front of you in order to transpose data?

A Yes. You have to have the source document which would be the data sheets from the performed test.

Q … So how could you tell whether or not the ESW 115 through 308 does not belong there?

A I would have to go through the procedure and look. How did I determine it today? It's because I knew that the procedure didn't have those valves in there.

Q Okay. You knew that even without looking at the data sheet?

A Today, at this time? Yes, I did.

Q Okay. How about at the time? Was that apparent to you?

A It was apparent when I looked at the procedure.

Q Okay. Now Joint Exhibit 109, … And then now that you have that, describe again what is supposed to be done with the data in Joint Exhibit 109?

A The data in Joint Exhibit 109 should be transposed into the tech databook figure 19.8.

Q And did Mr. Chacon do that?

A It does not appear that he did that.

Q Do you have any explanation for the errors that he made in not transposing the data from 109 to Joint Exhibit 59?

A Well, my assumption is that he got the old Rev 14 and I don't know where he got the valve positions from. Maybe he took them from a different place in the procedure. I'm

not sure. I don't know. No, I can't recreate how Mr. Chacon got here.

Q Could the Chacon draft in Exhibit 59 be signed and approved?

A No, no it could not.

Q What would be the consequence of signing that document as it was?

A Well, it would be erroneous. It would be not a data presentation.

Q And did you, in your review, compare data sheet 109 to the Chacon draft in Joint Exhibit 59?

…

A I don't know that I compared it to the Chacon draft. I compared it to the document that Mr. Turcotte had prepared.

Q Okay. And how did you determine that there were errors in the Chacon draft?

A … I discussed it with Mark. I think Mark came back, I guess maybe he had the Chacon draft and we looked at the procedure. Yeah, that's probably it, and said that these are, you know.

Q Okay. So what were the errors in the Chacon draft other than the failure to omit the items that you indicated at the bottom of that first grid?

A Well, we just, I just indicated the valve 1-WMO-733 the number of turns in the flow-balance position didn't match. There's other valves on this table that the turns do not match from the data sheet in the procedure…

Q The data presentation in 109 with Exhibit 59.

A Yes.

Q And also extension Joint Exhibit 13.

A Yes. I talked about valve WMO-733. Also valve 713 is reflected differently… On Joint Exhibit 109, valve 1-WMO-713 is reflected as seventeen and one quarter turns

as left position and on Exhibit 59, page 1, 1-WMO-713 is expressed as seventeen turns from closed. Now on 109, Joint Exhibit 109, valve 1-WMO-725 is expressed as seventeen and three quarter turns and on Joint Exhibit 59 valve 725 is expressed as open.

Q Are these valves in the same order on each document?

A No, they're not.

Q Does that mean anything to you?

A It would indicate again that he had not taken his data directly from the procedure…

…

Okay. Valve 1-WMO-723 on Joint Exhibit 109 says seventeen and three quarter turns and on Joint Exhibit 59, I'm sorry 723, says open.

Q What is the, obviously that's different but what is the significance of the difference?

A Well, the significance of the difference is this valve may be full open at seventeen and three quarter turns. I don't know that. However, they may not be the same. So if seventeen and three quarter turns is not full open then the flow could be different and the flow to those components could be affected which may not be adequate in meeting the safety function.

Q Was it your interpretation that Tony Chacon was supposed to interpret the seventeen and three quarters as open or?

A No. It was my interpretation that he would transpose the data.

…

Q And then do you see the 737 valve in question?

A Yes. And I see that the as left position is twenty-five which matches what is on, which does not match what is on Joint Exhibit 59, the Tony Chacon draft, but does match what is on Joint Exhibit 13.

Q Was that another error committed on the Chacon draft?

A Yes, that would be another error committed on the Chacon draft.

Q What is your opinion of the number of errors made from Joint Exhibits 109 and 110 to Joint Exhibit 59, the Chacon draft?

A Well, I would say they're numerous enough to indicate that the data did not come from the test procedure.

…

Q What is the consequence of having incorrect valve terms?

A Well, you could, the consequence would be similar to what we experienced when we first started to run this test and found that one of the valves was out of position. And that was, I think I mentioned, I don't remember which valve it was. There was a condition report written on it but if my memory serves, it was supposed to be twenty-one turns and according to the tech databook and it was actually set at sixteen turns which would be considerably more closed.

Q Now when Mr. Turcotte presented you Joint Exhibit 13, were the numbers on the right hand side filled in?

A I believe what happened is Mr. Turcotte had Mr. Chacon's draft and he had started working on it and removed the non-throttle valves which is the ones we referred to as 1-ESW-115, 109, 305, 307, 243, 306, 308. He already removed those and he had reprinted the document and he had come to see me because I had the test procedure in order to put those valve positions in or mark up the Chacon draft or something of that nature, to check those.

Q Okay. And the exercise that you just engaged in had to be performed on September 26th to get the right numbers there, correct?

A Yes.

…

Q Well, time had to be spent correcting it, correct?

A Yeah, time was spent.

Q If it was correct to begin with, would any time have to be spent correcting it?

A I see what you're saying. They required work to correct it. It required work to correct it, that's correct.

Q In your view –

A Re-work, whatever you want to call it.

Q Was that unnecessary work that had to be done to correct the Chacon draft in your view?

A Yes.

Q What was the goal of you and Mr. Turcotte in making changes to the Chacon draft?

A To up, well it was to complete Mr. Turcotte's task which was to update the tech databook which is an output of the procedure. The procedure has a step that says initiate tech databook update.

Q And does the information have to be correct?

A Yes, the information should be correct.

Q And is that what you did?

A Yes.

Q …[B]ut in terms of your involvement on September 26th, why don't you describe what your involvement was vis-a-vis, Mr. Turcotte's involvement?

A With regard to this tech databook?

Q Yes with the tech book, what we just went through.

A Well, that's essentially my involvement, was what we just went through.

Q Okay. And then you simply checked one set of data against the draft or Mr. Turcotte's draft?

A Yes.

Q Okay. Did you make any other changes on Mr. Turcotte's draft? Or did you make any changes on Mr. Turcotte's draft?

A No. I know Mr. Turcotte's draft didn't have the plus or minus two [turns] on it.

Q Did you know what that issue was?

A That was the issue that was being addressed by the DIT.

Q Okay. And then were you aware of what that issue was on September 26th?

A Yes. Yes, at some point in the day I was aware of it.

Q Now the Chacon draft has a plus or minus two turns in Joint Exhibit 59 and on Joint Exhibit 13 it doesn't?

A That's correct.

Q Okay. Why was it omitted?

A Because the DIT wasn't approved yet that would provide the basis for making that change to the tech databook. That was not a data presentation change. That plus or minus two turns wasn't derived or annotated or anything else in the test procedure. It was not an output of the test procedure. So it was a change of another nature.

Q Okay. And what time did you and Mr. Turcotte go over Joint Exhibit 13?

A I'd say it was roughly noon time frame.

Q Okay. Did that time frame have any significance?

A Well, I know Mr. Turcotte had a deadline from Mr. Stark to get the tech databook update done by noon.

Q Okay. Was there any discussion between you and Mr. Turcotte about the DIT?

A Well, we knew the DIT, it wasn't a lengthy discussion. We knew the DIT wasn't there yet and I think the rationale for doing this change was this would separate the two issues so that the reviewer who was doing the DIT change would only be evaluating that change and not also having to go through the process we just went through that took half an hour that it took in here.

Q Right.

A He would be spared that process because it already had been done off the DIT critical path so to speak, if I can say it that way. So he would not have to, because we had done the data presentation change, he would not have to go back and start at Rev 14 and do the data presentation, verification and do the evaluation of the plus or minus two turns.

Q Were you trying to expedite or slow things down?

A We're trying to, expedite, we're trying to get the work that could be done, done.

Q Now on top of Joint Exhibit 13, the first entry twenty-four turns from closed?

A Yes.
…

Q Was it accurate to put twenty-four turns from closed under 1-WMO-733?

A Yes, it was. Yes, it was.

Q Even without the tolerance of plus or minus two turns?

A Yes.

Q Why is that?

A. Because that's what it was set at as an output of the procedure. The tolerance would give you tolerance going forward. The valve was not going to be repositioned physically.

Q Did you have any concerns with the entry for 733 in Joint Exhibit 13 when you signed this document as the reviewer?

A No.

Q Do you have any concerns now in hindsight?

A No.

Q Was there any indication from Mr. Turcotte as to when the DIT was going to arrive?

A I really wasn't really tracking that DIT progress at all because it wasn't really in my job assignment. I performed this review for Mr. Turcotte and signed as reviewer and then he did the rest of the review which would include the rest of the processing which would include getting it signed by Ed, both on this sheet and the cover sheet which is page 1 of Joint Exhibit 13.

Q Did you see, the first page of Joint Exhibit 13, when you signed on page 2 of the document?

A I believe I did.

Q Did you understand this was a data presentation?

A Yes, it's clearly annotated as a data presentation.

Q And did there come a time when you talked with Ed Brouwer about Revision 15 in this exhibit, Joint Exhibit 13?

A I think, you know, Mark came back, we went through the numbers. He went back and electronically produced the change. He came to me, I signed this. I think he went to Ed and then he had some discussions with Ed and then either Ed came, either I went to Ed's office or Ed came back to my office where the procedure was again. And Ed, and Ed himself, did a verification.

Q And Ed signed?

A And Ed signed.

Q Did Ed ask you any questions?

A No.

Q Do you know if Ed asked Mark Turcotte any questions?

A I don't know. You mean, well, they had some discussions before I was interjected but I don't know what they discussed.

Q Okay. What is the difference between signing reviewed by and signing approved for use?

A Well, my interpretation is that a reviewed by signature is a technical verification of accuracy of information. Whereas, an approved for use signature is a management signature that denotes that this document is technically accurate and meets management expectations. In other words, you could do something that was technically correct but not what somebody wanted to do.

Q Did management approve Joint Exhibit 13?

A Yes, they did and that's annotated by two different signatures. One on page 2 of Joint Exhibit 13 and the approved for use block in one more time on Joint Exhibit 13 at page 1 in the approved block.

Q Mr. Brouwer signed each document?

A Yes, he did.

Q Did Mr. Brouwer sign after you, do you know?

A Yes, he signed after me.

Q Is that a requirement?

A Yes.

Q How would you describe the extent of your involvement in these documents, Joint Exhibit 13, the Chacon draft and the transposition of data and so on?

A It was, I mean it was minimal really. It was that review that we just completed, you know.

Q Now I think I'd asked you some questions before about whether you assigned the technical databook task at the nine-thirty meeting and I believe you testified that you were not?

A That's correct.

Q So how did it come to pass that you signed as the reviewer?

A Mark needed, to process the change, he needed to have a reviewer. I was available so he asked me to do it. I did it.

TR 756-776.

From the above testimony, several items are clear. First, using the Chacon draft would have resulted in incorrect information in the update. Second, that Tipton's review of Turcotte's data did not amount to a violation of management direction on Tipton's part where no member of management ever assigned the project to him. Third, in submitting the update prior to the DIT, and in opposition to management directives, Tipton's role was to simply review and verify that the data from the test was correctly written into Rev 15. It was not his decision to ignore management's wishes regarding incorporation of the DIT nor was he remiss in his role as reviewer in not incorporating the "+/- two turns where they were not data from the test. Last, Turcotte at all times bore the responsibility for the Tech Databook change, not Tipton.

Consequently, uncontroverted evidence establishes that Tipton did not receive, nor was he responsible for, following management directions regarding the Tech Databook update and therefore, this stated reason is not legitimate. It was Turcotte's responsibility to complete this assignment and it was to Turcotte that management gave their directions. Turcotte not only received this assignment from Stark, in front of Tinkle, but also accepted full responsibility for the change. TR 1885. Additionally, he received approval from his own supervisor, Brouwer, to submit Rev 15 pre-DIT. TR 230, TR 92, 94-95. If a failure to inform management of the change in direction occurred, the fault lay with either Brouwer or Turcotte, but nothing implicates Tipton with this responsibility.

It is irreconcilable how the fact-finding team reached the conclusions they did based on the statements received from those interviewed. I find Stark's role in the "Recommended Disciplinary Action" and the investigation utterly disingenuous where it was Stark who directed and assigned Turcotte, not Tipton, the update and all witnesses verified this assignment. Despite the clear and consistent evidence, and his own personal knowledge, Stark assigned blame for failing to follow direction to Tipton. Even assuming that Stark imputed knowledge of the Chacon turnover "directions" to Tipton based on conversations in Tipton's office that morning, the facts show that Chacon is not a member of management and his directions, which were not forwarded to Tipton, do not amount to *management* directions. TR 1882. For Tipton to fail to follow management orders they must have been directed to him by management. His mere presence at the 9:00 a.m. meeting when Turcotte was given them does not suffice. The evidence fails to show this fact. Additionally, Chacon stated during the investigation that the discussion in

Tipton's office centered on the removal of extraneous valves that Chacon had included and did not address waiting for the DIT. TR 1890-1891.

I&M asserts that Tipton failed in his responsibility as reviewer of Turcotte's Rev 15 because he did not ensure that the information from the Chacon draft was incorporated. Again, I find this assertion contrary to the facts. The reviewer's responsibility is to compare the test data obtained with the change as written. Tipton did just that. TR 93-94. He did not sign as the approver but merely as the reviewer. Additionally, it is uncontested that had Tipton or Turcotte used Chacon's erroneous data, the change would have been fundamentally flawed, incorrect and perhaps even prohibited as Turcotte believed. TR 1669. I&M's arguments and conclusions here are fantastic and irreconcilable. In its Post-hearing Brief, I&M asserts that Tipton's failure to follow management directions regarding use of the Chacon draft amounts to "willful disobedience, insubordination or failure to carry out any reasonable order" and operates as grounds for disciplinary action. Brief at 56. I&M objects to Tipton's characterization of his role as reviewer, as limited to technical verification of data. I&M argues that as Lead Test Engineer, Tipton bore a greater responsibility based on his expertise. Brief at 58. Employer acknowledges in a footnote,

> It may well be that Mr. Turcotte, a subordinate with limited testing experience, who only began working on the ESW... Testing on September 24…, played the main role in revising Mr. Chacon's draft of TDB Rev 15. But it is incontrovertible that, in processing the TDB change, Mr. Turcotte and Mr. Brouwer, as well as management, relied on Mr. Tipton's testing experience and judgment.

Brief at 58, n. 58.

I find this argument patently false and contradictory for several reasons. First, it is uncontroverted that the Chacon draft contained errors and in the end, the data was not used in the change approved by Stark. Second, assuming I&M's argument regarding Tipton's expertise is correct, then he exercised his judgment when discussing with Turcotte the need to correct Chacon's data. However, where it was Turcotte's responsibility to complete the update and Brouwer's duty to supervise the process, Tipton cannot be held responsible for failing to inform management of this "change" in direction. Moreover, the definition of "insubordination" is "to not be submissive to authority." THE AMERICAN HERITAGE DICTIONARY 667 (2nd ed. 1982). Where management assigned the Tech Databook update to Turcotte, Tipton could have been found insubordinate by exerting control over someone else's assignment; even more so where a supervisor was appointed to provide oversight.

Lastly, the designation of Lead Test Engineer does not appear in the record. Instead, I&M attempts to confer some sort of added responsibility onto Tipton by virtue of his experience and expertise. However, Tipton's official job title is the same as that of Chacon. Admittedly, he formerly held a supervisory position but he did not hold one during the ESW testing. Consequently, I find this argument of I&M is meritless.

To follow I&M's arguments on this point would create a "no-win" situation for Tipton. If Tipton had insisted that Turcotte use Chacon's incorrect data, he would have been wrong and remiss in his duty to check the data as performed by the test. I&M blames Tipton for not using the Chacon draft yet presents no evidence to refute the testimony of several witnesses that the Chacon draft was error-ridden. To the contrary, Stark himself testified that the Chacon draft contained errors. TR 1669. If Tipton had taken the issue up with management then he could have been found insubordinate based on Stark's management directions given at the 9:00 a.m. meeting.

Regarding I&M's allegations that Tipton's actions caused a delay, the evidence does not support this. Stark himself told Brad Williamson, the independent investigator, that he had no problems with Tipton's actions until the alleged "lying." JX 37. Furthermore, Stark testified that the six-to-seven hour delay in receipt of the DIT did not cause any delay in the restart process. Yet, in his deposition, he contradicted his testimony by stating that he would have had a problem with the engineers and their delay. TR 1632. However, the fact-finding team did not investigate the engineering staff for their role in the delay.

Tipton's counsel also impeached Stark's testimony as follows:

> Q Well, referring to your deposition at page 136, at line 20, you say, "Yes, we were delayed. Why we didn't deliver on time." Question, "Because the DIT was delayed?" "Right, but that's not the only reason." Question, "What's the other reason?" Answer "We didn't have this document you referred back to, the Tony Chacon document which had --" Do you remember those questions and those answers?
>
> A Not specifically, but again, it was in the deposition so they were asked.
>
> Q Sounds like you're saying there were two reasons for the delay. One, no DIT was available; and two, Mr. Turcotte didn't use the Chacon draft.

TR 1674. If failing to use the Chacon draft caused a delay then that delay was necessary and unavoidable in order to correct the mistakes. Use of the Chacon draft meant using flawed data. TR 59, JX 59, JX 109, TR 60. Where I&M then blames the two-step update process, doing both a pre-DIT and post-DIT change, the testimony reflects that Turcotte's efforts in drafting the second change with the expected DIT justification made the post-DIT change possible within a matter of less than fifteen minutes. TR 101.

Turcotte sent the second change draft at 4:23 p.m. to the reviewer with the DIT arriving at 4:30. JX 14, TR 1659-1660, 1666. Testimony shows that Turcotte's version and the final, signed version of Rev 16 differed only in the signatures. TR 104. Stark attempts to argue that the delay occurred because the Command Outage Center ('OCC") believed the Tech Databook change was complete when Rev 15 was submitted. However, he testified that it was Steve

Papageorgiou's responsibility to monitor the progress of the DIT, which he failed to do, and that it was Stark who gave the OCC incorrect information about the completion of Rev 15. TR 1647-1648. Moreover, the DIT justification analysis required that an additional step be done in order to complete the update, known as an applicability determination per 10 C.F.R. 50.59. TR 160-1661. However, completion of this additional task was not assigned to Turcotte nor could it be done ahead of the DIT.

As for I&M's contention that the post-DIT change necessitated another reviewer; who necessarily was not familiar with the document and thus would require more time to review it; I find this argument erroneous and false. The facts show that Tipton would not have been available to review the post-DIT change because the DIT did not arrive until after he had finished for the day. Therefore, had Rev 15 never been done, a "new" reviewer would need to be brought into the process.

Additionally, I find I&M's arguments on this point egregiously false where Stark testified that he did not know how long, if any, the delay was between receiving the DIT and completion of Rev 16, Joint Exhibit 17. TR 1667. He also testified that the final version of the update did not use the Chacon draft, yet he faults Tipton with failing to use it. TR 1673. During the hearing, Stark testified that Turcotte had "input into the delay" by not following directions. TR 1676. Again, his testimony was impeached by opposing counsel as follows:

> Q And again, going back to your deposition, continuing on from where I left off where you had talked about the Mr. Chacon document, Q, "The draft, Exhibit 12, which was the Mr. Stark deposition, Exhibit 12, what we have referred to as the Chacon draft?" Answer, "And we would have taken that document and followed it through the day with the DIT. When the DIT came out, we would have signed this tech databook off at that point in time. Because we didn't do that, we lost a couple of hours regenerating the tech databook." Question, "You're testifying if you had followed or Mr. Turcotte had followed the Tony Chacon draft?" Answer, "Yes." Question, "So, in your opinion, the Tony Chacon draft was more accurate than the Exhibit 14 initially prepared by Mark Turcotte?" Answer, "I wouldn't say it was more accurate. It had correct information in it, and it was the document that we were using to build our final document from, based on what the DIT provided to us."
> Do you recall those questions and answers?
>
> A. Yes.
>
> Q Now, you're not saying that Mark Turcotte delayed the draft or the presentation of Joint Exhibit 17 once he got the DIT in his hands, are you?

A Mr. Turcotte had input into the delay because as I've stated previously, he did not complete the tech databook as requested at the 9 o'clock meeting based on the DIT. And then, when we did get to the official Rev 16 late in the day, Mr. Turcotte didn't have any input in writing the applicability determination. So, I had to use other resources which potentially could have been working on other critical path activities to complete this task. And that time frame, there was some delay because we had to do the tech databook to address the issues as noted in the condition report.

Q Well, let me take you back to your deposition, page 139, line 4. Question, "So, you're not accusing Mr. Turcotte of any delay after he got the DIT in the drafting of Exhibit 13 which is Joint Exhibit 17, correct?" Answer, "No."
Do you recall that question and that answer?

A It's in the deposition, I said it.

TR 1675-1676.

In sum, I find that this articulated reason is controverted by the evidence, in particular by Stark himself, and therefore, I am permitted under *Reeves*, *supra,* to find evidence of discriminatory intent from this mendaciously proffered reason of I&M. Here, as in *Dysert*, the question turns on a determination that the employer, in particular Stark, did not honestly believe in the reasons offered. *Dysert,* 86-ERA-39, slip op. at 4-5.

c. <u>Past Performance Problems</u>

During the twenty-three months of Tipton's employment at Cook Plant, he received four written warnings for repeated performance problems, including failure to follow work instructions; received two suspensions, without pay, totaling six days and received a "substandard" performance appraisal. With each of these personnel actions, I&M warned Tipton that further problems might result in his termination. Post-hearing brief at 1-9.

Cook Plant used an employee evaluation program entitled "Performance Assessment for Results" or "PAR." Supervisors were trained in this program which instructed them to use varying methods of rating employee performance. PAR measured six "effectiveness standards" for performance: communications, job knowledge, leadership/initiative, problem solving, safety-consciousness, and work relationships. Supervisors rated employees in each category from a low standard of unsatisfactory to a high rating of exceeding standards. The result of the evaluation was that the employee received a weighted score, which placed him or her in one of four categories, referred to as "Tiers."

Tier I represented the highest level of performance and Tier IV the lowest. Tier III and IV rated employees faced the possibility of termination. A Tier III or IV employee was required to improve his or her performance in accordance with a personalized Action Plan within an allotted time period. The Action Plan detailed the "behaviors and/or circumstances" preventing adequate employee performance and provided specific actions needed to improve performance. Tier IV employees were given the option of a voluntary severance package. During the Action Plan period, an employee was required to demonstrate "immediate, significant, and continuous" improvement to succeed in his or her plan. If either a Tier III or Tier IV employee was unsuccessful in his or her Action Plan, that employee would be terminated.

In addition to PAR, Cook also employed a system entitled "Management Action Response Checklists" or "MARC." TR 1882. This system was used to handle grievances, disciplinary action, and job performance counseling. JX 78. The system included systematic procedures to assist managers and supervisors in handling those issues. The checklists comprise a series of questions or issues the supervisor should contemplate before taking disciplinary action or job performance counseling. Although there was no intention to merge the PAR and MARC programs, some supervisors used elements of MARC in performing PAR evaluations or in assessing an employee's success in his Action Plan. Supervisors maintain a "MARC file" for each employee they supervise and place in the file observations regarding employee performance. TR 1148-49; TR 1367. The first step in I&M's disciplinary process is a written warning. *See* JX 119 at 5; TR at 1597. The next level of discipline is suspension. TR at 1905. Disciplinary suspensions are not common at the Cook Plant. TR 1905. The next step after suspension is termination. TR 1905.

Prior to Tipton's termination in October 2001, Tipton earned a significant disciplinary history, including four written warnings and two disciplinary suspensions without pay. Contained in Tipton's MARC file were several warning letters and documentation of two suspensions without pay. On February 28, 2000, Tipton received a written warning regarding misuse of Company property, the e-mail system, for having an e-mail deemed inappropriate for the workplace. JX 81. In May of 2000, he received a warning for failing to meet expectations by being late to a meeting and for not attending a presentation. JX 85. Two weeks later, he received another warning for being late to a meeting by ten minutes. JX 86. By letter dated May 30, 2000, Tipton's supervisor detailed his performance problems and documented the contents of a conversation he had with Tipton regarding his performance problems. The letter recorded Tipton's two-day suspension imposed after the May 22 warning. JX 80. The supervisor warned Tipton that if any future instances of misconduct occurred in the areas of availability, conduct or work performance, termination could result.

In June of 2000, he received a warning that he needed improvement in his performance involving the Position Specific Guides and that his current performance was unacceptable. JX 87. During Tipton's most recent annual review, dated August 10, 2000, he received a PAR rating of Tier III. JX 82. He "meets" [sic] the effectiveness standards with the exception of the area labeled "communication" which is ranked "inconsistently meets." The objective job related example included:

> Ken is inconsistent with communications. Has difficulty arriving on time to meetings. Has been late for the 0700 Engineering Production Meeting on numerous occasions requiring written

> warnings and time off without Pay. During 0700 meetings he typically could discuss topics associated with testing activities.

JX 82

Consequently, on September 19, 2000, Tipton and his then-supervisor, along with Mark Stark, entered into a ninety-day Action Plan, the purpose of which was to "clarify what is expected of [Tipton] and the consequences of either improvement to a 'Consistently Meets Standards' level of performance or failure to improve to that level." meetings and communication of work status to the supervisor. The "Expectations Section" stated:

> You are expected to improve your performance to a level that "Consistently Meets Standards" in every Effectiveness Standard. Slight or sporadic changes are unacceptable. Sustained performance at a level that "Consistently Meets Standards" is the outcome *necessary for continued employment* at AEPNG. *Failure to improve and sustain acceptable performance will result in termination*.

JX 88 (Emphasis added).

Thereafter, due to his participation in a training course from October 16 to December 11, 2000, I&M extended his Action Plan until successfully completed as of February 6, 2001, when he was elevated to a Tier II ranking by Curtis Miles. JX 83. The extension related solely to his participation in training and a change in his supervision. JX 89, JX 90. With his improved ranking came the admonishment that Miles expected Tipton to sustain or improve the Tier II level of performance and if he did not do so, he would be subject to disciplinary action including termination. JX 83.

On May 22, 2001, however, Tipton received his second suspension of four days. JX 79. The basis for the suspension, according to Curtis Miles, rested with Tipton's failure to take responsibility for an assignment concerning an over-expenditure on a test. Miles requested that Tipton resolve the issue of getting approval or justification for the cost overrun but did not do so. Additionally, a fire protection test did not run as scheduled even though Tipton had advised Miles that the test would be run as arranged. JX 79, 93. The letter contained the warning that any additional instances of refusal to take responsibility for work assignments would result in more severe disciplinary action including possible termination. JX 79; *see, also,* JX 94 (detailing defensive posture of Tipton during his discussion with Miles); JX 98 (e-mails from Miles and Stark to Tipton regarding over expenditure and e-mail from Tipton asserting that he is not the proper person to handle the issue); JX 96 (summary of events by Eric Lee surrounding the fire protection testing and noting that Tipton was in training for one half day without anyone appointed to fill in for him); JX 97 (e-mail regarding unpaid invoices of Sun Technical for services of contractor on the test overrun and instructing Tipton to call the project manager for funds); JX 98 (e-mail from Tipton asking how he can resolve this when a manager should be talking to the project manager, noting that because this was a capital project the funds should come from the capital fund, and asking if Stark wants him to process a request to fund the rest of

the ongoing testing. Stark responded by directing him to contact the project manager and if unsuccessful, to contact Stark in order to obtain funds from elsewhere).

On May 4, 2001, Miles initiated a fact-finding investigation regarding Tipton's conduct. JX 99. During the interview, Tipton stated that he had talked with the Project Manager about the cost overruns but reiterated his position that this was a job for management and that he did not have supervisory functions to approve budgetary items. JX 99 at 4. The investigation resulted in a finding that Tipton had failed to complete assignments. JX 100 at 3. Tipton testified that he was unjustly disciplined for something he was not responsible for and further, that he lacked the authority to address the issue. However, the record reflects a disciplinary appeals process at I&M yet Tipton failed to avail himself of this process or to protest the imposition of either of his suspensions. TR 1907. Consequently, I accord this argument little persuasive weight.

Tipton's next annual review, due in August 2001, did not occur. From the date of his last suspension, the recode reveals no new instances or allegations of misconduct or less-than acceptable performance. The evidence suggests the contrary: Brouwer testified that Tipton worked the day shift because he had superior skills in communicating and interfacing with other departments:

> Q Now, in terms of scheduling test engineers during the Flow Balance Testing, do you know who is in charge of making schedules for the employees?
>
> A I was.
>
> Q And it was basically 12 hour shifts during the tests?
>
> A Correct.
>
> Q And what considerations did you have to putting Tipton on the shift that he was on?
>
> A Since I considered him the most qualified on the mechanical side for plant testing, he was on day shift when there was more interface with the operations people and also management that were on site.
>
> Q And then you put Mr. Chacon on nights, as I recall?
>
> A Correct, Mr. Chacon was on nights. He was and is still a good test engineer. But he has more electrical background. He can still run the ESW Flow Balance but on night shift there are fewer management folks around and things generally go a little smoother at night. That's why he went on night shift with Hank Bransford.

Q In terms of management, does management work days or nights?

A They work both but there are more managers on site during the day shift than night shift.

Q Was that fact a consideration in having Tipton on during the days?

A Yes, it was.

Q What was that consideration?

A Ken was also very good at explaining to individuals what was going on and what the results were up to that stage. So he was a better person to speak to management and anybody else who would ask questions about a Flow Balance testing.

TR 314-315.

Also, Brouwer testified:

Q …While you supervised him, did you become aware of his skills in the area of testing?

A Yes.

Q Can you describe those?

A In my opinion of the testing group on the mechanical side of the house, he was by far the best qualified.

Q In what way?

A He knew more about the equipment and the systems than any other person in the testing group and as such he was the most qualified to run the mechanical tests.

TR 310-311.

Brouwer confirmed, "I observed Tipton every day that he worked there…He did a fine job as he normally did when he was working." TR 354. He also told Brad Williamson, the investigator, that Tipton was not exhibiting any performance problems; he was the most competent in his group and was on his way to being a good performer. JX 37 at 24-25. He also believed that there were no integrity or character issues with Tipton. Tipton presented a Cook Plant newsletter dated September 21, 2001, giving him and Chacon "kudos" for their work on

the ESW testing project. Tipton offers this as support that he was not exhibiting any performance problems and was instead doing good work. JX 19, 37 at 54.

There is significance in that Brad Williamson, the independent investigator questioned what the poor performance that caused Tipton's termination was. JX 37 at 30-31. He did not find during his interviews with Tipton's management any indication that Tipton's performance declined. Additionally, the timing of his termination did not coincide with any true performance problems and his past performance issues are too attenuated in time to be a catalyst for termination some five months later.

Undoubtedly, Tipton had been a problematic employee in the past. Jim Molden testified "[S]ince I've been at Cook, I've never seen a record as bad as Mr. Tipton's." TR 1350, 1360-61. Donna Kelly testified that only one other employee at Cook Plant possessed as poor an employment record as Tipton and that employee was terminated. TR 1917. If I&M wanted to terminate Tipton, they could have done so in lieu of the suspension in May based on the terms of his Action Plan. Additionally, Tipton was due for his next annual review in August of 2001 and Plant management could have terminated him then. That management did not conduct his review suggests no overwhelming desire to rid the Plant of his presence as of August. I find that the legitimate reason provided, poor past performance, cannot be separated from Tipton's engagement of protected activity. The employer bears the risk that the influence of legal and illegal motives cannot be separated. *Machowiak*, 735 F.2d at 1164; *Guttman v. Passaic Valley Sewerage Comm'rs*, Case No. 85-WPC-2, Final Dec. and Order, Mar. 13, 1992, slip op. at 19, *affirmed sub nom. Passaic Valley Sewerage Comm'rs v. Martin*, No. 92-3261 (3d Cir. Apr. 16, 1993).

Certainly, I find that Tipton's past performance problems are significant. However, Employer fails to produce legitimate evidence that he exhibited unfavorable conduct that would warrant his termination during the period since his last unfavorable action. Because the AEP personnel policies do not permit consideration of past performance problems until after a determination of misconduct has occurred, and I have found no evidence of wrongdoing on Tipton's part, his past performance problems may not permit I&M to validly 'leap frog' over the policies to legitimize their actions.

Under the whistleblower law, the burden of persuasion that the termination reasons are legitimate lies on I&M and not on Tipton. Admittedly, employers should be protected against the opportunistic use of such law by borderline employees who engage in contemporaneous misconduct. However, harmonization of the tension between employee whistleblowers and their employers must further the stated goals of the Whistleblower Acts which is to encourage engagement in employee reports of employer violations under the NRC. In *Texas Dept. of Human Serv. v. Hinds*, the Court concluded that:

> [T]he standard of causation in whistleblower and similar cases should be such that, without it, the employer's prohibited conduct would not have occurred *when it did*[;]…this practice best protects employees from unlawful retaliation without punishing employers

> for legitimately sanctioning misconduct or harboring bad motives never acted upon.

(Emphasis added); 904 S.W. 2d 629, 634-36 (Tex. 1995); *quoted in O'Rourke v. Commonwealth*, 778 A. 2d 1194, 1204 (Pa. 2001).

Here, I find that Tipton's termination cannot hinge on his past performance problems where I&M has not shown why the termination occurred when it did. The past performance problems appear to be limited to the past. There is no evidence in the record that Tipton continued to engage in any misconduct after his last suspension and I find no clear and convincing evidence that he lied or failed to follow management directions. I&M's termination decision did not hinge on continued poor performance but allegations of misconduct along with his past performance problems. Consequently, I find that it is more likely than not that Tipton's protected activity contributed to the decision to fire him where this stated reason cannot carry Respondent's burden. Therefore, I&M has failed to establish by clear and convincing evidence that Tipton's past performance problems, dating back at least five months, led to the determination to fire him in spite of his protected activities. Moreover, the fact that this reason cannot sustain Tipton's termination decision supports the inference of discriminatory intent on the part of I&M.

d. <u>Conclusions Regarding the Investigation and Termination Decision</u>

When evidence shows that the employer's articulated reasons are false, the evidence may be enough to allow the trier of fact to find for the plaintiff if he has also shown the elements of his *prima facie* case. *Reeves*, 530 U.S. 133, 148 (2000); *see, also, Overall, supra.* Ruling for the complainant in *Overall,* the DOL did not find direct evidence of discriminatory intent, determining instead that a number of factors revealed a pretextual basis, rather than a legitimate reason, for the adverse employment action. ARB No. 98-111. First, the DOL found substantial evidence that the employee received uniformly favorable evaluations and second, that removing him from his position just three months after granting him a performance-based award, seemed too incredulous.

Third, the DOL noted as a significant event the numerous meetings of Plant management in attempting to find ways to prevent costly delays. The Complainant had submitted a report regarding the failure of a piece of equipment that resulted in a delay. The DOL credited his testimony that management dissuaded such reports that would lead to delays. Fourth, the DOL found probative the fact that management transferred investigation of the failure away from the employee. Where his report raised issues that, if investigated, could have further delayed the re-start of operations, management of TVA declined to follow through on his complaints. Finally, the DOL found the NRC's subsequent reprimand of TVA compelling. In sum, the DOL inferred that TVA's stated reasons for transferring the complainant were false and were actually motivated by a desire to remove him to cover-up the report that would have caused expensive delays.

Under the facts of the instant case, there is no reprimand by the NRC and therefore, the complaints made by Tipton as evidence are not as compelling as the substantiated report issued

by the complainant in *Overall*. However, it is clear that I&M, failed to investigate or to take action regarding the scheduling of excessive hours during the ESW testing in the same manner that TVA refused to investigate Overall's report. I&M, in fact, immediately suspended Tipton and proceeded to continue scheduling the test engineers for hours in excess of the regulatory limits. Here, as in *Overall*, management placed an inordinate amount of pressure on its employees to avoid delays at all costs. Abiding by the safety-related regulations would have resulted in a delay in the re-startup process at Cook. While some evidence suggests that Stark may have inflated the issue with Tipton in order to cover-up his role in providing incorrect information to the Outage Command Center, that then may have caused a delay, I find more plausible a different reason. Simply put, management wanted to invoke a chilling of employee complaints regarding their scheduled work hours. The fastest way to achieve restart at Cook would be for the employees to work continuously until done irrespective of the limitations. The credible evidence is uncontroverted that Cook Plant was understaffed and therefore, replacements for breaks and days off were not available. TR 318. Consequently, I find that here, as in *Overall*, Employer's stated reasons are false.

Evidence presented that weighs against a finding that an invidious motive led to Tipton's adverse employment action includes Molden's and Stark's testimony that the suspension order occurred after top management became aware that the Tech Databook change did not occur as expected. TR 1347-50. According to Molden, the question of work hours never entered into the decision and furthermore, he noted that Tipton had more significant employee problems than anyone stating, "[S]ince I've been at Cook, I've never seen a record as bad as Mr. Tipton's." TR 1350, 1360-61. Kelly also testified that the work hours issue was not mentioned.

However, I have previously noted that his questioning during the fact-finding investigation belies Molden's statement dismissing the idea that work hours entered into the decision. JX 37 at 71. He asked Turcotte about Tipton's statements regarding his excessive hours and the fact that he twice requested an approved deviation request. *Id.* Whereas Molden was not present for the 9:00 meeting when these statements were made, it is clear that a discussion occurred between 10:00 a.m. September 26 when the meeting concluded and the time of Turcotte's interview where Molden was told about Tipton's work hour complaints. He incorporated the issue into the investigation by questioning Turcotte about it. Clearly, he thought that Tipton's remarks had some bearing on the investigatory process. Yet he disingenuously denied any discussions of the sort. As for the corroborating testimony of Stark, I have found his testimony to be less credible than those who testified regarding management's implicit expectations regarding continuous work until re-start was achieved. Consequently, I do not find these claims credible.

Turning to the results of Stark's fact-finding investigation, I find that his recommendations to upper management are contrary to his personal knowledge and are not reflective of the investigation itself. Stark's assertions in the recommended termination were inconsistent with his own actions regarding the assignments handed out at the 9:00 a.m. meeting. I find that Stark intentionally misrepresented the facts surrounding the Tech Databook assignment, and the dispensing of management directions regarding the same, to upper management and that this misrepresentation of the facts led to Tipton's termination. Stark's investigation findings alleged that Tipton failed to follow management directions, yet no one

indicated that a member of *management* directed Tipton regarding the Tech Databook update. Stark also contradicted his investigatory results by saying to Williamson that Tipton was guilty of no wrongdoing. JX 37 at 7-8. He also said that there was pressure from top management to justify terminating Tipton, implying that the reasons given were not the true reasons.

Admittedly, Tipton was present when Turcotte was directed to wait for the DIT, however, that direction was based on using Chacon's draft, which Turcotte and Tipton determined to be incorrect. Furthermore, Brouwer approved of the Tech Databook direction change; Tipton did not make the decision and, instead, merely signed as reviewer. Tipton received blame for failing to use the data presentation from the Chacon Draft, yet Stark himself used the exact same data as Tipton in Rev 16. This indicates that Stark himself did not use the contents of the Chacon draft except for the "+/- two turns" tolerance as provided by the DIT after Tipton left for the day. Lastly, Turcotte accepted full responsibility for the update process.

Stark failed to communicate any of these facts in his report and recommendation. In addition, Stark asserted that Tipton lied during the fact-finding based on the statements of Brouwer and Chacon who both confirmed, orally and in writing, that Tipton attended the alleged 8:30 turnover. However, Turcotte and Tipton told Stark the opposite. Turcotte's corroboration of Tipton's version weighs against a finding that Tipton lied, yet Stark omitted Turcotte's statement from his findings. Additionally, Stark phrased the questioning differently with Tipton than he did to the others.

In sum, I find that Stark intentionally misstated the facts in his recommendation to upper management that Tipton be terminated. The stated reason, failure to follow management directions, is patently false. As for Tipton's alleged "lying" during the investigation, I find that the facts were disputed and were not clarified by the investigators. In order to "make" the case against Tipton on this point, Stark brought in Chacon twice to reiterate his affirmation that Tipton was at the 8:30 "turnover" and Brouwer was forced to come in three nights in a row to "correct" his statement. RX 1. Additionally, Stark called Brouwer to return to work around 8:00 p.m. the evening of the 26th and he stayed until 1:00 a.m. to create a timeline of events for the day. JX 54. At the September 27, 2001, interview conducted just after midnight with Brouwer, Brouwer stated clearly that Turcotte received the direction from Chacon and Stark to do the change. JX 67. I&M acknowledged that Turcotte received responsibility for the TDB change at the 9:00 a.m. meeting in its response to interrogatories. JX 24.

Brouwer's statement attributed a face-to-face turnover with Turcotte, Chacon, Tipton and Brouwer to 8:30 a.m. Regarding the 9:00 a.m. meeting in Tinkle's office, Turcotte received the assignment to update the Tech Databook. The notes also reveal "Ken to be out of office by noon due to work hour limitations." JX 67 at 1. Around 2:00 p.m., Brouwer unplugged Tipton's phone because he was inundated with requests for assistance and Brouwer wanted him to focus on "CREM remarks and JOA closure." At 4:00 p.m., Stark requested that Brouwer and Tipton meet with Rod Foster to clarify comments on the procedure cover. Because Tipton was still working on the CREM remarks, Brouwer took Jim Parker. At 5:30 p.m., Rod Foster signed off on the flow balance procedure. Brouwer notes that Tony Chacon needed to be off on Thursday to reset his hours, yet according to an e-mail, he sent on Friday, this did not happen. Chacon

notified Management that as of September 28th "…I will not be available for test director after 12 noon on Saturday." JX 23.

At his second interview, held on September 27, 2001, at 5:30 p.m., Brouwer clarified his written statement of the events of the 26th by stating that Chacon, Tipton and Turcotte were all present when asked who attended the 8:30 turnover. JX 72. Brouwer then referred to the investigation as a "witch hunt." RX 1 at 4. His third interview reveals the specter of coercion and some definite misleading statements on the part of the interviewers. JX 73. Ken Rollins attended this fact-finding meeting with Stark and Donna Kelly at 7:30 p.m. on the evening of September 28, 2001. Brouwer opened the meeting by stating that he would not come in again on nights. To which Rollins replied that he took personal offense because Brouwer was a supervisor and they needed his help. The notes reflect this exchange by Rollins: "You should blame me. These 2 guys didn't want to bring you in. We wanted to bring you in to protect your integrity. For you to say 'won't come in' it's unprofessional." JX 75.

Brouwer then said that it was violating procedure for him to be at work again because he was exceeding the limitations by working in excess of 16 hours in a 24-hour period. TR 422. At that point, Brouwer was not sent home, nor does a deviation request or a CR appear in the record for this time period. Rollins asked for yet another written statement about September 26 and the notes stated:

> See why this is important. You have two guys that said my supervisor & guy turning over to me didn't have a conversation with me. You know who they are dumping on?...
>
> Your recollection & based on fact – can't flip. Maybe Ed was confused & we needed to give you a chance to say that. But if there is conflicting information we need to get information.

JX 75. The interview notes reflect that at 7:45 Brouwer left the room to write his statement. Brouwer returned twenty-five minutes later at 8:10.

Brouwer's "new" one-page statement of the issues dealt exclusively with the alleged turnover meeting at 8:30 a.m. JX 76. After listing those present in Tipton's office at 8:30, Brouwer stated that Chacon gave "an informal brief of the previous night's testing, including what issues were outstanding for the upcoming dayshift." He did not recall the specifics but said that it would have included the details in the e-mail, which mentioned the upcoming DIT and the expected tolerances, along with Chacon's draft. Brouwer noted that "specific assignments were not passed out (i.e. Mark Turcotte to pursue Tech Databook – Ken to pursue CREM) it was clear that the dayshift individuals were to pursue closure of the issues in Tony's e-mail." Brouwer's new statement implies that the "day shift" employees, meaning Tipton and Turcotte, were both responsible for the Tech Databook update. Yet this is contrary to the assignments from Stark at the 9:00 a.m. meeting.

I find Rollins deliberately led Brouwer to believe that he was being scapegoated or "dumped on" by Turcotte and Tipton in order to coerce him into modifying his statement to

reflect a bona fide turnover meeting at 8:30. Nothing in any of the interview notes or in the testimony mentions, or even hints at, Tipton or Turcotte laying the blame at Brouwer's feet. In fact, the opposite is true where Turcotte accepted full responsibility for carrying out the assignment and for making the decisions on how to accomplish that. Rollins' actions reek of deception and this presents strong evidence that the unspoken mission of the fact-finding team was to get Tipton irrespective of the truth. This deceptive ploy and badgering of Brouwer, three late night meetings in a row, presents a strong inference that the whole investigation operated as a ruse to get rid of Tipton.

The mere fact that Turcotte was interviewed twice, Chacon twice, and Brouwer three times, yet Tipton was only interviewed once also indicates the lack of a good faith effort to truly investigate the circumstances of this imbroglio or to draw out clarification from Tipton regarding his actions. TR 1933. Furthermore, in calling Brouwer in three times in the evenings, Plant management violated procedure regarding work hours limitations and thus, exhibited even more hostility to the regulations. Brouwer himself stated to management at the beginning of his third interview "we are violating procedure."[28]

Ms. Kelly volunteered that she submitted a condition report for violating the work hour limitations by working more than 16 hours in a 24-hour period. She offered this testimony as evidence that Cook Plant adhered to the regulations. However, her submission indicates a lack of knowledge regarding the work hour regulations. Kelly is not involved in safety-related or maintenance functions and thus is not subject to the work hour limitations.

Of most significance, is the fact that although Management challenged Tipton's review of the data and stated that he failed to use the Chacon draft in the Recommended Action, the eventual update as signed by Stark used the exact same data as the change reviewed by Tipton. TR 104, JX 14, 17. The only change between the Turcotte/Brouwer/Tipton version and the one signed by Stark was the "+/-" tolerance. The data presentation from Chacon's draft was not used by Stark's version, Rev 16. TR 291. Thus, blaming Brouwer and Tipton for "failing to use the Tech Databook Draft" is clearly a bogus claim and a tacit admission that the Chacon draft was incorrect. Additionally, I note that although Stark was aware as early as 1:00 p.m. on September 26 that the Tech Databook was not changed according to his purported direction, he did not do anything about it until after Tipton sent his 4:29 p.m. e-mail in Joint Exhibit 16 asking for the work authorization request allowing him to work that day be produced. Tipton's distribution of the e-mail to Brouwer and Tinkle as well as Stark made it a "public" issue that Stark could not ignore.

In addition, Rollins participated in the decision to terminate Tipton yet he admitted that management members did not investigate the errors allegedly contained on the Chacon draft before deciding to terminate Tipton. TR 1258-1260. He agreed at the hearing that the differences between the draft change that management directed be used, Chacon's draft, and the

[28] Key Maintenance Personnel are defined as those personnel responsible for the correct performance of maintenance and repair or calibration of safety-related structures and those "who are personnel performing or immediately supervising the performance of such activities." JX 4 at 1. Under the plain language of the NRC, the working hour limitations would also apply to Brouwer and indeed his name appeared on a number of deviation requests.

corrected version actually used were substantial. TR 1259. However, no one reviewed the Chacon draft for errors prior to terminating Tipton for his alleged failure to follow directions in using it or for his alleged shortcoming as a reviewer. TR 1260. Respondent submitted this answer to Complainant's Interrogatories regarding the reasons and timing for Tipton's termination:

> Mr. Tipton was terminated October 2, 2001, after I&M had completed and evaluated the conclusions of its fact-finding investigation into the facts and circumstances surrounding the changes made to Technical Data Book 1-Figure 19.8 on September 26, 2001.

Then again, as Rollins admitted, the changes made were due to the substantial errors of the Chacon draft, yet management failed to investigate this aspect despite the information provided by Brouwer, Turcotte, and Tipton that the Chacon draft was faulty. Based on the fact-finder's results, Tipton was "damned if he did and damned if he didn't" verify the Chacon draft. If he had verified incorrect data, he would have failed as a reviewer. Where he verified correct data, I&M found his performance lacking. This result is incredulous and cannot be parsed into any semblance of legitimacy. The timing of his termination did not coincide with any true performance problems and his past performance issues are too attenuated in time to be a catalyst for termination five months later.

I find that the speciousness of the investigation's findings and the employer's explanation confirm evidence of discrimination under *Reeves v. Sanderson Plumbing Products Inc.,* 530 U.S. 133 (2000). In *Reeves,* the United States Supreme Court held that when a plaintiff establishes a *prima facie* case of discrimination, combined with sufficient evidence permitting the fact-finder to reject the employer's proffered non-discriminatory explanation for its decision, a finding of liability is justified although not mandated. The *Reeves* decision held that a lower Court over-read *St. Mary's Honor Center* and incorrectly failed to consider the evidence supporting the petitioner's *prima facie* case and the evidence challenging the respondent's explanation for the adverse personnel action. 530 U.S. at 146-147. Clarifying its decision in *St. Mary's Honor Center,* the Court held that "it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." *Id* at 147. Stating:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination.

St. Mary's, 509 U.S. at 511 (emphasis in original).

The Supreme Court elaborated on this concept by holding that an unworthy employer's explanation offers a form of circumstantial evidence that may be quite persuasive. *Reeves*, 530 U.S. at 147; *citing, St. Mary's*, 509 U.S. at 517 ("[P]roving the employer's reason false becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was

intentional discrimination."). After eliminating the employer's declared reasons, what remains is an inference that discrimination is the most likely alternative explanation. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978) ("[W]hen all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts with *some* reason, based his decision on an impermissible consideration."). The Second Circuit held that pretext can be demonstrated by "evidence of inconsistencies or anomalies that could support an inference that *the employer did not act for its stated reason.*" *Keller,* 105 F.3d at 1523 (*quoting, Sempier v. Johnson & Higgins*, 45 F.3d 724, 731 (3rd Cir. 1995) (emphasis in original).

Thus, I find "quite persuasive" the substantial evidence proving that I&M's explanation for the termination is false. Tipton's evidence casts strong doubt on I&M's allegation that he lied during the fact-finding investigation. More importantly, the record is devoid of evidence that Tipton bore responsibility for any failure regarding the Tech Databook. Therefore, I may permissibly infer the "ultimate fact of discrimination from the falsity of the employer's explanation" and rule against the employer. Here, as in *Reeves,* the employer's articulated reasons for terminating Tipton are false.

The decision to terminate Tipton was entered into by a small number of people and was based on the recommendation of the fact-finding investigation conducted by Stark. However, Stark falsely asserted to them that Tipton lied and that he failed to follow management directions resulting in a delay. The circumstantial evidence, when viewed *in toto*, cannot be segregated to form a coherent, plausible explanation for Respondent's actions. Admittedly, discrimination may not have been a substantial factor in Respondent's decision, especially in light of his problematic prior performance, but it need not be for Tipton to prevail. The discriminatory motive need only be "more likely than not a contributing factor" in the decision. To require a greater showing would undermine the purposes behind the amendments of 42 U.S.C. § 5851.

Accordingly, I rely on *Reeves* and find that I&M's contrived reasons for terminating Tipton, combined with his *prima facie* case, permit me to assign liability for unlawful discrimination against I&M.

5. Disparate Treatment

Under *Trimmer,* disparate treatment in similar situations, as done by the employer, may provide highly probative evidence of retaliatory intent. *Supra; see also, Germann v. CalMat Co.*, ARB No. 99-114, ALJ No. 1999-STA-15 (ARB Aug. 1, 2002); *aff'd sub nom, CalMat Co. v. U.S. Dept. of* Labor, 364 F. 3d 1117 (9th Cir. 2004). The facts of this case present some evidence of disparate treatment between Turcotte, Brouwer, Chacon and Tipton regarding the events of September 26th in two ways. First, although not similarly-situated workers, Turcotte worked as a contractor and Tipton as a permanent employee, the alleged instances of misconduct for which Tipton was fired were also engaged in by Turcotte. Specifically, Turcotte denied Tipton's presence at the so-called 8:30 turnover meeting but this was not considered lying by the fact-finders. Additionally, Turcotte also failed to wait for the DIT and to follow management instructions to use the Chacon draft, yet the characterization of his misconduct differed significantly from the view of management regarding Tipton's conduct.

Next, all of the fact-finding interviews confirmed that it was Turcotte who possessed the ultimate assignment for the Tech Databook change. The evidence here is uncontroverted that Turcotte received the turnover, face-to-face and in writing, from Chacon and additionally, that he received his management directions from Stark at the 9:00 meeting. JX 51, 62, 63, 64, 65, 70, 76, RX 1. Both Brouwer and Turcotte testified that it was Turcotte who decided not to use the Chacon draft and to submit the pre-DIT change. Consequently, Turcotte is guilty of: "lying" about Tipton's presence at the 8:30 turnover, failing to follow management directions, and for causing any delay due to his actions.

In spite of that, Molden decided to bring Turcotte back to work after his interview on the September 28th, despite the fact-finding investigation determination that management directions were not followed. TR 1354-1355. Turcotte never received as much as an allegation of lying much less any adverse action for failing to follow management direction. Most significant is Molden's testimony that he believed Tipton's less than forthright responses indicated a lack of integrity, yet did he not have any problem with Turcotte's identical conduct: denial of Tipton's presence at the 8:30 turnover meeting. He acknowledged that Turcotte made the decision to change the course of direction of management but the more severe misconduct, "failure to follow management direction" was offered as a justification for Tipton's termination. TR 1361, JX 20. Curiously, Molden stated to Turcotte when ending his suspension "...the conclusion I reached is this was a one-time event that you changed direction. You didn't get management approval to change the direction." TR 1362. Thus, Turcotte was guilty of failing to seek approval whereas Tipton was found guilty of failing to follow management direction: Turcotte was not dishonest but Tipton was guilty of lying.

Admittedly, Turcotte was not a permanent employee at Cook and therefore, I&M argues, not subject to discipline directly by Cook management. TR 1573. However, the AEP Employee Handbook states that temporary employees may be released without following the disciplinary process and furthermore, the company reserves the right to discipline such employees without following the fixed procedures. JX 6 at 5. Clearly, Cook could have disciplined Turcotte irrespective of his temporary or contract status. Stark admitted at the hearing, regarding Turcotte, that "If there was an issue, then he would be released back to his contractor." TR 1573. Where Turcotte and Tipton were both assigned as test engineers, I find that they were similarly situated in position on September 26, 2001. Furthermore, the argument by Cook management as to why Turcotte was not disciplined for identical conduct is fictitious based on their policies.

Turning to the suspension issue, the test here is disparate *treatment* and not disparate *discipline*. In *Berkman v. U.S. Coast Guard*, the ARB found evidence of disparate treatment in the enforcement of a policy regarding leave. ARB No. 98-056, ALJ No. 1997-CAA-2 (Feb. 29, 2000). The complainant, Berkman was reprimanded for failing to obtain permission to take sick leave. Company policy required a direct conversation with the supervisor in order to take sick leave. Yet employees who merely left messages for the supervisor were permitted leave, but Berkman received an AWOL sanction after attempting to reach his supervisor, was unable to do so and left a message instead. The ARB concluded that, in the absence of any explanation for the uneven application of the Company policy, the Company policy was applied against

Berkman due to his protected activity. The ARB based its decision on the uneven application of Company *policies* not on the meting out of discipline.

The facts here involve the uneven application of company policy as well. Kelly testified that the MARC policy dictated the suspension of all employees involved in an incident of suspected misconduct. She also testified that the handling of the Tech Databook change prompted the investigation. If true, then all "key personnel" as identified by Molden, should have received suspensions. The fact that only Tipton and Turcotte, both of whom complained about the work hour policy violations, were suspended presents evidence of an impermissible motive on the part of I&M.

Disparate treatment is also evident between Tipton and Brouwer. Brouwer was present at the 9:00 meeting when Stark made the assignment to wait for the DIT to complete the update. He was also present during the 8:30 'turnover' with Chacon. He played a larger role that Tipton in completion of Rev 15 for two reasons: first, he signed as approver, meaning that he approved the draft and its completion, and second, because Turcotte sought and received Brouwer's authorization to submit the update, Rev 15, pre-DIT. He also failed to inform management of this change in direction. Brouwer saw no problem with Rev 15 omitting the "+/- two" turns because the numbers on Rev 15 reflected exactly what came out of the test procedure. TR 402. He acknowledged awareness of Stark's instructions to wait for the DIT and to incorporate the tolerances into the change but felt, as Turcotte did, that the change needed to be done by the noon deadline. TR 403. He admits that he did not follow management directions to incorporate the tolerances from the DIT. TR 418.

In spite of that, Brouwer was not suspended pending the outcome of the fact-finding investigation contrary to management's assertions that suspension of "all involved" pending completion of an investigation is standard procedure. TR 427, 1882. Kelly testified that "it is our process" to suspend people during an investigation. TR 1882. Employees under investigation are "suspended pending the outcome," according to Stark. TR 1559. Brouwer was surprised that he was not suspended because "We were all in this thing together, we all made the decision, and yet I was [the] person that was in charge of it and signed for it…" TR 429.

Although Chacon's draft contained errors, Chacon was not suspended, according to Kelly, because he had given directions regarding the DIT to Tipton. TR 1882. Contrary to the facts, Tinkle testified that certain key individuals in the Tech Databook incident were suspended but that Brouwer was not suspended because he did not have "hands-on involvement in the technical Databook." TR 1501. Neither of these two were suspended. Disparate treatment is discrimination when one employee is treated less favorably than another for a forbidden reason. *See, Teamsters v. United States*, 431 U.S. 324, 335 n. 15 (1977). Additionally, members of management admit that Chacon made substantial errors in his draft, which resulted in the need to re-write the draft and correct the errors. TR 1259-1260. In spite of that, Chacon was not disciplined, sanctioned, or even suspended with pay during the investigation regardless of his role in the perceived delay and in the failure to provide a draft to be used as directed by management.

Brouwer received a written warning for unsatisfactory performance. JX 25. Stark wrote, "you have been remiss in your duties as a Supervisor for failing to follow up and ensure that the Tech Databook Rev 15 was updated *based on the Tech Databook draft.* In this situation, you signed off on the document as the "approver" without verifying whether or not the information in the data book was correct." (Emphasis added). Contrary to the investigation's findings regarding Tipton, Brouwer was not accused of failing to follow management directions. Making this letter even more problematic is the fact that Brouwer's failure to use the Chacon Draft resulted in an accurate change instead of the incorrect Chacon version. Indeed Rollins agreed on cross-examination that "fairly substantial differences" existed between the Chacon draft change and the Turcotte change at Joint Exhibit 17. TR 1259. Rev 16, as later signed by Stark, did not use the Chacon draft data. Instead, it mirrored Rev 15 and included the corrections made by Turcotte with the addition of the tolerances supplied by the DIT.

According to Kelly, the company's practice (the MARC process) was to suspend all those "key personnel" involved in a particular incident until the investigation ended. TR 1882. Molden admitted that Brouwer served an integral part as a key person in Rev 15 and that Chacon was a key individual in the process. TR 1502-1503. It is clear that if Rev 15 and its creation triggered the investigation, then all three of those whose names that appeared on it should have been suspended. The fact that the investigation resulted in disciplinary action against Brouwer, yet he was not suspended during the investigation, indicates that Brouwer was definitely involved as a key person and therefore, according to policy, he should have been suspended. JX 25.

Consequently, I find that the disparate treatment regarding the suspension provides some indication of an unlawful intent for Tipton's' adverse employment action related to the suspension. Where company policy was to suspend all key personnel involved in an incident and Brouwer and Chacon were identified as key personnel in this incident, then the suspension policy should have applied to them as similarly situated employees. The fact that Tipton and Turcotte were the only two suspended and were the two who complained about the work hour situation at the meeting that day creates the inference of an impermissible intent. I find that a disparity exists in the differential characterization of the similarly claimed unsatisfactory performance between these employees. Where Tipton was the most vocal in complaining about the working hours, I also find that disparate treatment existed because Tipton and Turcotte were suspended but not Brouwer or Chacon. This disparate enforcement of company policies between the similarly situated "key personnel" involved in the Tech Databook change and the differential characterization of misconduct between Turcotte and Tipton, presents evidence of an impermissible motive.

6. Initiation of Fact-Finding Centered on Ken Tipton

Donna Kelly testified that in her initial conversation regarding the investigation, Rollins and Stark told her that the nature of the investigation centered on Ken Tipton. TR 1878. She testified:

> They described the nature of the investigation as a situation where an employee, Ken Tipton, was given direction. And the direction

> that he had been given was to wait for the DIT to come to get the Tech Databook change processed. And that did not occur. And so our role was to understand how that happened.

TR 1878. Still, the Tech Databook change listed Turcotte as 'initiator' and Brouwer as 'approver.' In addition, Stark was well aware that he assigned the update to Turcotte and not to Tipton. If Kelly accurately portrayed the conversation with Rollins and Stark then Stark fraudulently represented the facts to her. It is implausible that management could have reached the conclusion that Tipton was to blame based on the submitted Tech Databook revision, the three signatures on it and the assignments made by Stark at the 9:00 meeting. Consequently, I find that where the initiation of the investigation was contrary to the facts, as known by Stark, and where the investigation immediately centered on Tipton, there is an inference that an impermissible motive colored the investigation and suspension.

7. The Williamson Investigation Results

After Tipton alleged that his termination related to his engagement in protected activity, Cook Plant hired independent investigator, Brad Williamson, to investigate. JX 37, TR 1826. Williamson interviewed members of management as well as all the employees involved in the September 26th events. JX 37. He also examined the notes of the fact-finders' interviews and Tipton's personnel file. Williamson began his investigation by meeting with members of Plant Management and then proceeded to interview all relevant members of Cook Staff, including Tipton and Turcotte. The Williamson report concluded that Tipton's assertion that his termination was the result of his raising concerns regarding the work hours was unsubstantiated and that the evidence and interviews failed to provide proof that working hours were associated with the termination. TR 1828, JX 37 at 6. In Williamson's opinion, Tipton was terminated as the sole result of his past poor performance. RX 37 at 1-4. The report also found a number of inconsistencies.

A key finding of his report states "It's realistic that when asked if he had attended an 8:30 meeting, he could have said no and not been trying to mislead the investigators." JX 37 at 5. Where Tipton was not the focus of the turnover, Williamson found it conceivable that he may not have recognized the 8:30 meeting in his office as a turnover. In Tipton's interview, Williamson noted no signs of lying and questioned why Tipton's work hour extension was not approved. He wondered what poor performance caused the termination. JX 37 at 30-31. Williamson concluded that, in this case, Tipton "performed his job responsibilities in accordance with the applicable procedures." JX 37 at 5.

According to both Tipton's supervisor and his manager, he completed his assignment. Stark stated that he could find 'no wrongdoing' on the part of Tipton until the issue of lying came up. Williamson also determined that the Tech Databook incident caused no delay in the restart process. Consequently, I find that Stark's comment directly contradicts the representations he made to management in his Recommendation of Action to terminate Tipton.

In Ken Rollins' interview with Williamson, he stated that Tipton's working hours were not discussed when deciding to terminate him. JX 37 at 9. Yet Jim Molden brought up the

working hour complaints during the fact-finding meeting with Turcotte, and Brouwer brought them up during his interview, although Brouwer's comments were not included in the interview notes. TR 1222, RX 1. In addition, Williamson noted that Rollins admitted refusing to approve Brouwer's deviation request form. JX 37 at 9. According to Rollins, Tipton and Turcotte discussed with Stark their problems with the Chacon draft and asserted that they would not sign it. JX 37 at 9. Rollins was upset with Williamson for not accepting his interpretation of the events. After this interview ended, Williamson concluded it was possible that a hidden reason existed for Tipton's termination, although there was no direct evidence that it was related to the work hour issue. JX 37 at 10. Williamson also noted "…it cannot be determined without doubt what he was terminated for."

In Stark's interview with Williamson he stated that he explained the September 26th delay to Joe Pollack based on the signatures on Rev 15. He relayed that Joe Pollack was furious at the delay. JX 37 at 7. He made a "pissed off" statement and said that he wanted Turcotte and Tipton fired. When Molden was told, Stark quoted him as saying "we've got him, it is time for him to go" referring to Tipton. Stark also stated that it was Turcotte who "blew it." JX 37. According to Stark, Rollins reviewed the investigators' package and made the determination to change Tipton's role from "no problem" to lying. Stark also stated that he felt a lot of pressure to justify terminating Tipton from Molden and Pollack. Williamson recorded Stark's opinion that Tipton was guilty of no wrongdoing and that the only issue was whether he was truthful or not. JX 37 at 8. In a prior interview with Stark, Williamson noted that Jim Pollack said that although they couldn't use Rev 15 the way it was written, technically, Turcotte did not violate procedure in the manner he chose to do the Tech Databook update. JX 37 at 36.

Brouwer's interview corroborated the fact that Turcotte received responsibility for the Tech Databook change; Tipton may have worked close to 100 hours in the preceding seven days; the work group was significantly under-staffed; and that there existed a general reluctance to raise working hour extension issue. JX 37 at 24. Brouwer told Williamson that there were no integrity or character issues with Tipton and that he was the most competent member of his group, but that he "didn't take things lying down." Brouwer did not know why he was not told the reason for Tipton's termination even though he was his direct supervisor. According to what Tinkle told Brouwer, Tipton's termination had nothing to do with the Tech Databook. Williamson then concluded that Tipton was exhibiting no performance problems. JX 37 at 25.

Chacon told Williamson that he had already turned over to Turcotte when Tipton received a brief turnover lasting two minutes. JX 37 at 26. He also felt the group was understaffed and overworked. He noted that Tipton routinely raised concerns about workload and manpower and that he was the smartest one in the department. Williamson concluded that "there was no turnover as such at 0830." JX 37 at 27.

Turcotte also related that Tipton worked in excess of 90 hours, the department was understaffed with maximum time pressures, and that he asked Stark at the 9:00 a.m. meeting to stop directing people to exceed the work hour limitations. JX 37 at 32. He again admitted responsibility for the TDB change and confirmed that he did so on the day of the event. JX 37 at 33. He asserted that the investigation of the event was outlandish, that the fact-finders "bullied people" into providing statements and were called in during the middle of the night.

Williamson made notes during his initial interview with Molden, Horvath, Kurt Dailey, Jim Labis, and Dave Jenkins. JX 37 at 38. His notes show that Turcotte claimed a chilled work environment, that "Turcotte has a history, a rap sheet" and that Molden was more worried about Turcotte because Tipton has a poor performance record. TR 37 at 38. Those interviewed claimed that Tipton lied and that the Tech Databook was central to the whole issue. There is no indication that Williamson asked those in attendance whether the work hours issue raised by Tipton was discussed prior to the decision to terminate Tipton. He did not independently interview Molden.

A significant finding reached by Williamson was that excessive hours were the "norm" for this work group. JX 37 at 4. He also found that despite the lack of deviation approval and contrary to Plant procedure, managements' expectations were that the employees would violate the work hour limitations. He noted that in some cases, deviations were approved but that historically the limitations were disregarded in the Test Engineering Group. JX 37 at 4.

Respondent argues that Williamson's conclusion regarding the motive behind Tipton's termination is significant. Post-hearing Brief p. 46 n. 50. Quoting the Williamson report:

> There was no indication that Mr. Tipton was terminated because of his raising of concerns regarding work hour limitations…All of those interviewed who knew the reasons for his termination reported that he was terminated for continuing poor job performance, failure to meet management expectations on this assignment, and lying about this attendance at the 0830 turnover meeting. All of the written documentation supports this argument and the termination package is complete and thorough in substantiation his termination for the reasons stated.

Respondent's Post-hearing Brief p. 46 at n. 50.

However, these are not Williamson's conclusions. Instead, they are his summary of the "Allegation." Unfortunately, Williamson's conclusions address the absence of direct evidence, which I have already determined is not present here. His conclusions do not address the circumstantial evidence utilized in Whistleblower suits. Respondent neglected to mention the other problems in Williamson's report, such as:

> The investigation did not [substantiate] Mr. Tipton's claim that his termination was the result of his raising concerns about working hours. Though it is reasonable to conclude that he was terminated because of his history of poor job performance, there are several inconsistencies in the event leading up to his termination that require discussion…
>
> Despite several requests and one e-mailed request for written permission to exceed his working hour limitations, Ken Tipton

> never received permission …Though he received no formal direction to violate the working hour limitations, that was clearly the expectation ...Working hour limitations were historically disregarded with the Test Engineering Group...
>
> Mr. Tipton clearly has a history of poor job performance. In this event, though he did not complete his task in accordance with management expectations, his performance was consistent with plant procedures …However, in this case, he executed his job responsibilities in accordance with the applicable procedures. *Mr. Tipton's supervisor and manager agree that Ken Tipton was not assigned the TDB responsibility*, and that though he did not meet the Maintenance Manager's expectations completely, *he completed his assignment as required. Mark Stark even went so far as to say that he could find no wrongdoing on the part of Ken Tipton until the issue of lying came up…*

JX 37 at 4-5 (Emphasis added).

The conclusions appear to adopt an inconsistent posture from Williamson's interview findings relating to the "turnover" that may not have been a true turnover in Tipton's mind, and was not in Turcotte's opinion. Moreover, I have found that it is not the documentation that is problematic. Instead, the nature of the leading questions asked of some interviewees versus the barren and single question posed to Tipton in the fact-finding investigation as discussed, *supra.* A thorough investigation would have entailed the re-interview of Tipton, as done with Brouwer and Chacon, to clarify his statements.

Lastly, the Williamson conclusions state that a justification for the termination includes "continuing poor performance" yet that is not what the Recommended Action says nor is it consistent with the interviews conducted with management. The Recommended Action relied on past performance problems in conjunction with the alleged lying and failure to follow management directions. Indeed, Stark told Williamson that he did not see any problems and that Rollins changed the investigation from "no problem" to "lying." JX 37.

In sum, I find that the Williamson investigatory finding directly contradict the Recommended Action submitted by Stark and provides clear evidence that the reasons for terminating Tipton were deceitful and false. Management did not see real problems with the manner in which the change proceeded and Williamson could not find any evidence of misconduct by Tipton. He determined that his termination rested solely on his past performance. If true, then the temporal proximity to the adverse action presents strong inference of discriminatory intent.

8. Failure to Follow Company Personnel Policies

Precedent developed under the anti-discrimination provisions of the National Labor Relations Act, which is relevant to interpretations of the federal environmental whistleblower

protection statutes including the ERA; *see* S. Rep. No. 414, 92d Cong., 2d Sess. 80-81 (1972), *reprinted in* 1972 U.S.C. C.A.N. 3668, 3748-49; *Ewald v. Commonwealth of Virginia,* ALJ No. 1989-SDW-1, slip op. at 8, n.10 (Sec'y Apr. 20, 1995); *DeFord v. Secretary of Labor,* 700 F.2d 281, 285 (6th Cir. 1983); provides that an employer's failure to follow its own progressive discipline policy is frequently indicative of a hidden, unlawful motive for imposing more severe discipline. *See, Fayette Cotton Mill*, 245 NLRB 428, 429 (1979); *Keller Mfg. Co.*, 237 NLRB 712, 713-17 (1978); *Taylor Bros., Inc.*, 230 NLRB 861, 868 (1977).

The evidence presented shows that I&M used a series of steps to pilot its personnel decisions. JX 26. A supervisor's checklist for stepwise discipline guided the fact-finding team in their investigation of potential misconduct. (JX 26 at 1). Initially, Stark and Kelly listed the purpose of the fact-finding investigation as an investigation into the "failure to complete the Tech Databook in a timely manner after the original document had been prepared in the early morning of September 26, 2001." The "Seven Tests of Just Cause" checklist asks if the employer, "before administering the discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order to management?" JX 26 at 5. Stark and Kelly answered "yes" to this item even though the statements gleaned from the interviews and from Stark's own personal knowledge of the assignments made on the 26th establish that Tipton did not have responsibility for completion of the update. JX 38. Furthermore, the investigation established that Turcotte made the decision with Brouwer not to use the Chacon draft. I find that this element of the "Just Cause" checklist was not followed.

The next item, "Was the employer's investigation conducted fairly and objectively?" was also not followed. Kelly testified that from the beginning the blame for the Tech Databook lay at Tipton's door. TR 1878. Stark testified that he felt pressure to "get rid" of Tipton from upper management. Additionally, the questioning of the others involved differed from the questions asked of Tipton. Tipton was asked if he attended the "turnover meeting at 0830 with Tony Chacon and was the tech databook discussed?" JX 71 at 1. He was not asked if he attended a meeting at 8:30 with Brouwer, Turcotte and Chacon. At Chacon's first interview, Stark asked "During the turnover with Ken Tipton, Mark Turcotte, and Ed Brouwer…" JX 61 at 2. During his second interview, Chacon was asked, "Turnover at 8 or 8:30 you stated Mark, Ed, you & Ken were there. Tell us who was there?" JX 73.

Brouwer was asked by Stark "We'd like you to write a statement about the 8:30 meeting. Where [sic] you in the room?" JX 75. Stark used the word "meeting" and not the word "turnover" with Brouwer. With Chacon, he clarified the question by listing the participants. In Turcotte's interview, Turcotte answered that Tipton was not at the turnover with Chacon. JX 37. Indeed, Turcotte was asked by Stark and Rollins "What [meeting] turnover?" and Turcotte replied "closer to 0600" which would have been the traditional turnover with Chacon and not the 8:30 alleged turnover including Tipton. When asked if he attended a turnover with Brouwer, Turcotte said "no." Clearly, Turcotte, along with Tipton, did not consider the chaotic *ad hoc* meeting at 8:30 to be a "turnover."

Based on the interchangeable terms "turnover" and "meeting" as used at Cook; because Tipton "normally" conducted his turnovers at the end of one shift and the beginning of another; and because Tipton knew Turcotte and Chacon had done a traditional turnover at 6:00 a.m., he

may have truthfully answered "no" to this question. *See* JX 37 at 5 (Williamson report). In addition, the fact-finders asked others if they attended a "meeting" at 8:30 or if they attended the turnover with the list of names. Only Tipton was asked simply if he attended a "turnover with Tony." The fact that the investigative team decided that Tipton lied; even though Turcotte responded "no" to the question as well; and the fact that the blame for the change was assigned in advance to Tipton; evinces a lack of fairness and objectivity in the investigation process.

To bolster their claim of "lying" by Tipton, Stark and Kelly noted that employees are expected to cooperate during investigations. JX 26 at 5, 10. Yet Tipton answered every question asked of him and reported to the site to be interviewed as asked. JX 71. Nothing in the record suggests a failure to cooperate. It is clear that the investigatory team reached their conclusions regarding Tipton in spite of the evidence deduced from their interviews and even in contravention of their own conclusions where Stark did not see a problem with the 'following management' directions issue. If Stark did not see a problem with Tipton's performance "until the issue of lying came up" then it is unclear from the record how the other allegations of his failings came to be in the Recommendation of Action. Consequently, I find that the team did not achieve this "Just Cause" item in their disciplinary process.

The next step in the process is a "Should do" checklist. JX 100. Again, I find that Stark and Kelly failed to follow this process. Specifically, the investigators are asked if the facts prove that the employee was "indeed the person guilty of the wrongdoing?" to which Stark and Kelly checked affirmatively. JX 26 at 11. However, all reports during the investigation, and according to Stark's own assignments, point to Turcotte as the one responsible for not using the Chacon draft and as the one responsible for completion of the update prior to the DIT completion. Another item, "Did the employee's violation or misconduct impair the job performance of other employees?" received a checkmark and the notation that "Ken signed the TDB as the approver when the information was not complete." Nothing in the record supports this statement. Tipton signed as a reviewer, not as approver. His job was to ensure that the test data presentation matched that as listed on the update. There is no doubt that the data presentation he approved was correct because Stark himself later approved the exact same data in Rev 16. Therefore, Tipton correctly performed this aspect of his job and the fact-finding team failed to meet this item.

The checklist asks if "documentation exists which supports management's position" yet the reports of all those interviewed or those who supplied written recollections of the 9:00 a.m. meeting reported that Turcotte received the action to do the TDB change and that he decided to remove the tolerances from the Chacon draft. JX 12, JX 21 (Stark), JX 63 (Papageorgiou), JX 64 (Mitch), JX 65, JX 67 (Brouwer), JX 70 (Turcotte), JX 71 (Tipton), RX 1. The investigators stated that Tipton's statements supported their position and provided documentation to support their position. However, as noted *supra*, all other reports state otherwise. Therefore, this item fails to satisfy the "Just Cause" process.

Furthermore, Cook Plant's disciplinary process requires that all of seven listed tests be true before disciplinary action would be proper. JX 26 at 13. Several listed factors, however, are not true. First, the Employer must make an effort to discover whether the employee did in fact violate or disobey a rule or order. Clearly, the results of the investigation reveal that the

completion of Rev 15, done contrary to Stark's directions to wait for the DIT and to use the Chacon draft, occurred due to Turcotte and not due to Tipton. Additionally, the facts are, at most, ambiguous regarding the issue of Tipton's truthfulness. The fact-finders went out of their way with five interviews with Chacon and Brouwer and four written statements to characterize the 8:30 meeting as a turnover meeting. Yet, Tipton was asked only one question on one occasion with no follow questions to clarify his response. Furthermore, Turcotte's denial corroborated Tipton's statements and should have been investigated as fully as Brouwer and Chacon's statements.

Second, the Employer's investigation must be conducted fairly and objectively, but for the reasons discussed, *supra*, I find this was not done. The initiation of the investigation involved getting rid of Tipton and possibly Turcotte, yet the alleged impetus for it was the perceived delay in moving to Mode 4 as blamed on Rev 15. Yet three employees signed Rev 15 and only Tipton and Turcotte were suspended. Tipton was fired and Turcotte was called back to work. Additionally, the uncontested evidence shows that it was the Engineering Department who caused a delay in production of the DIT of at least five hours and yet they were not investigated or disciplined regarding the delay. Consequently, it is clear from the evidence that the investigation was not entered into objectively nor was it conducted fairly and in accordance with the facts.

Third, the employer must apply the rules even-handedly and without discrimination. I note that at no point was Chacon, who without denial erred in producing his draft, investigated for his role in the delay. Brouwer also was not suspended pending the outcome of the investigation in accordance with company policies, even though he ultimately received a written warning for his role. JX 25. Specifically, Stark admonished Brouwer for failing to follow up and ensure that Rev 15 was updated using the Chacon draft and for signing off as approver without verifying whether the information in the Tech Databook was correct. The investigation shows that Brouwer approved Rev 15 and accepted Turcotte's decision to submit Rev 15 prior to the DIT. Therefore, his role in the events of September 26 is much larger than Tipton's, who merely compared the data presentations for transposition errors. I find that this element of the "Just Cause" process was not followed.

Also required to be true is the assertion that the evidence or proof, discovered during the investigation, of the employee's guilt be substantial. JX 26 at 13. Here, the facts are uncontroverted that an impromptu meeting took place around 8:30 a.m. in Tipton's office where Tipton and Turcotte were present along with Chacon and Brouwer at some time before 9:00. What the evidence controverts is whether this meeting was the equivalent of a bona fide "turnover" such that Tipton's denial amounts to a lie. As I have already discussed, the evidence here is at best conflicted and at least ambiguous. Turcotte and Tipton denied the 8:30 turnover and Stark used the word "meeting" and not the word "turnover" with Brouwer. With Chacon, he clarified the question in advance by listing the participants. In the end analysis, the "evidence" collected by the investigative team could hardly be characterized as "substantial" on this point.

The evidence surrounding Tipton's alleged failure to utilize the Chacon draft is even less compelling. Nothing in the evidence even suggests that Tipton was responsible for completion of the TDB change. To incorporate the suggestion of I&M that his mere presence in his office

when Chacon and Turcotte were discussing it with him amounts to "management direction" is fallacious at best. All accounts of the 9:00 a.m. meeting counter the argument about Tipton's presence at the 8:30 "turnover" as well. Even if Tipton could be said to have received instruction from Chacon at 8:30 (to use the draft and wait for the DIT) Stark's assignment of the TDB update at the 9:00 a.m. meeting would have superseded Tipton's implied responsibility. Stark, a member of management assigned the task unequivocally and explicitly to Turcotte. Tipton's presence at the 9:00 meeting when Turcotte received the instructions to wait for the DIT is not sufficient to impute responsibility to him. Were this so, then everyone present at the 9:00 meeting would bear responsibility simply from his or her presence. I refuse to adopt this ludicrous insinuation. Again, then I find that the fact-finders failed to follow the "Just Cause" process on the element of substantial evidence.

Next, I note that the Checklist requires a preponderance of the evidence standard. JX 26 at 16. The investigators are instructed that mitigating factors may need to be considered. Specifically, when closer supervision could have prevented the employee's poor performance, then the supervisor is likely to bear some responsibility and thereby mitigate the employee's misconduct. JX 26 at 16. The investigators here allege that Tipton failed to perform because he "needed to stop the process & seek clarification relative to the TDB" yet Brouwer admitted during the investigation that he was responsible for overseeing the change but failed to supervise the process. RX 1, TR 368. Again, I note that it was not Tipton's initiative that led to the change from Stark's instructions nor was it Tipton's responsibility for doing so. It was solely the decision of Turcotte with Brouwer's approval. Consequently, even if the investigators' conclusions were correct regarding Tipton's actions, they should have "mitigated" Tipton's role by placing blame on Brouwer and Turcotte.

Of most importance, the "Just Cause" process states the following:

> Even though the employee may have performed badly or behaved improperly and in an unacceptable manner, if conditions existed which the employee could not control which prevented proper performance, then the employee's misconduct would be mitigated during arbitral review. Likewise, if the employee would have had to violate a law or public policy in order to satisfy management's standard, the employer will find it difficult, if not impossible, to prevail in arbitration.

JX 26 at 16. Assuming that all allegations of the fact-finding investigation were consistent with the evidence, the investigators failed to consider the above statements.

At the time of this incident, Tipton had worked over 90 hours in the previous seven days. The conditions existing at the time show a high pressure, high workload environment. The purpose of the work hour limitations is to prevent employees from making mistakes and errors in judgment when overworked. Thus, Tipton's excessive work hours; and the fact that he had attempted to rest that day; should have mitigated the perceived misconduct. Additionally, the statements above suggest that, where circumstances beyond the employee's control prevented proper performance, the misconduct should be mitigated. Under these facts, Tipton had no

control over the fact that the Chacon draft contained errors. He also had no control over what Turcotte decided to do with his assignment or with Brouwer's approval of the pre-DIT change. He certainly had no ability to compel production of the DIT on time. Consequently, the fact-finders failed to follow the mitigation phase of AEP's personnel policy.

Of additional significance is the admonishment on the "Just Cause" checklist that the employee's past performance record "should not play a role in determining in a current incident whether or not discipline should be invoked." JX 26 at 11. Only after the present circumstances warrant discipline, should the past performance come in to play to determine the severity of the discipline. If the process and true facts from the investigation were followed, then Tipton's conduct on the 26th would warrant no discipline and the past performance problems would not enter into the decision. *See e.g. the Williamson Report, supra.* However, the fact-finders instead bootstrapped the past performance problems onto their erroneous findings in order to justify recommending termination.

After determining that I&M failed to follow their investigatory process, I now turn to their adherence to the disciplinary process. Kelly testified that I&M uses a graduated discipline process. TR 1905, JX 6 at 5. The Employee Handbook provides the following three step sequence for disciplinary action: (1) a written warning entered in the employee's work record; (2) suspension or unpaid layoff ranging from a few days to a few weeks; and (3) discharge. However, this sequence applies to incidents involving the same offense: "Initial discipline for a particular offense is normally a written warning, followed by suspension without pay, and finally discharge for *recurrence of the same offense*." JX 6 at 5 (Emphasis added). It is clear from the evidence, and essentially undisputed by I&M, that it did not follow its disciplinary procedures with respect to Tipton. No credible argument has been advanced that Tipton engaged in such serious misconduct that an exemption from the normal corrective discipline sequence was warranted. Instead, I&M seeks to shoehorn the events of the 26th into a finding that Tipton failed to follow management directions, an offense for which he was previously suspended and a repeat offense would then justify termination.

Additionally, the fact that Tipton was not further warned or disciplined after May 2001, for any alleged attitudinal shortcomings or misconduct takes on heightened significance in light of I&M's maintenance of a progressive discipline policy. Juxtaposed against Brouwer's comments that Tipton was the most qualified testing engineer in the group and a good performer, these findings appear even more contrived. Certainly, the counterfeit allegations of "lying" and "failure to follow management directions" do not amount to intervening events sufficient to overcome the inference of retaliatory motive. Furthermore, I&M's disingenuous argument that Tipton's after-discovered violations of the e-mail policies indicates that he was violating a policy he was previously disciplined over is fallacious at best. The implication is that Tipton was a repeat offender and as such the severity of the discipline, termination, was warranted.

I&M's attempt to bolster their argument that his termination was justified, by characterizing the Tech Databook change incident as one in which Tipton "failed to follow management directions", is a thinly-veiled, deliberate warping of the facts in order to cobble together his termination with his previous suspension for failing to follow management directions. JX 79.

Consequently, where I&M failed to follow its personnel policies with regard to Tipton, I find that the decision to terminate Tipton indicates an unlawful motive and the desire to rid the company of an engineer who persisted in complaining about excessive hours, in obtaining a deviation approval and who had also been ordered to report to work in derogation of the NRC limitations on the number of hours worked.

In conclusion, I find that the record demonstrates substantially and by a preponderance of the evidence that his protected activity was more than likely a contributing factor to the adverse employment action.

XI. Legitimate, Nondiscriminatory, Separate Reasons for Complainant's Termination

After Tipton proved by a preponderance of the evidence that the Employer discriminated against him, I&M may avoid liability if it proves by clear and convincing evidence that the proffered reasons; lying during the fact-finding investigation, failure to follow management directions, and past performance problems; are legitimate and nondiscriminatory reasons. As discussed, *infra*, I have found these reasons to be untruthful and illegitimate. Admittedly, I noted that the evidence of lying by Tipton could be considered ambiguous at best; I&M has a burden of presenting clear and convincing evidence under the 1992 amendments at 42 U.S.C. § 5851(a)(1). Therefore, I&M has not carried its burden and may not avoid liability.

XII. After-acquired Evidence of Tipton's Violation of the Electronics Communications Policy

Respondent offers another reason to legitimize their decision, Tipton's alleged violation of the Electronic Communications Policy. The Employer proffered Respondent's Exhibits 5-10 and 18-34 as evidence that Tipton would have been terminated in March of 2002 after discovery of personal or objectionable e-mails in his mailbox.

Employer seems to be arguing that if, after an alleged wrongful discharge, the employer discovers evidence of wrongdoing that would have led to the employee's termination on lawful and legitimate grounds; the after-acquired evidence may be applied to prevent the Complainant from recovering. The United States Supreme Court granted certiorari in a Sixth Circuit case, *McKennon v. Nashville Banner Publishing Co.,* 115 S. Ct. 879 (1995), 1995 U.S. LEXIS 699 at *19 to address the issue. The Court wished to resolve conflicting views among the Courts of Appeals on the question whether all relief must be denied when an employee has been wrongfully discharged in violation of federal law and the employer later discovers some wrongful conduct that would have led to discharge if it had been discovered earlier. *Compare, Welch v. Liberty Machine Works, Inc*., 23 F. 3d 1403 (CA8 1994); *O'Driscoll v. Hercules Inc*., 12 F. 3d 176 (CA10 1994); 9 F. 3d 539 (CA6 1993) (case below); *Washington v. Lake County*, 969 F. 2d 250 (CA7 1992); *Johnson v. Honeywell Information Systems, Inc.*, 955 F. 2d 409 (CA6 1992); *Summers v. State Farm Mutual Automobile Ins. Co.*, 864 F. 2d 700 (CA10 1988); *Smallwood v. United Air Lines, Inc.*, 728 F. 2d 614 (CA4), *cert. denied*, 469 U. S. 832 (1984), *with Mardell v. Harleysville Life Ins. Co.*, 31 F. 3d 1221 (CA3 1994); *Kristufek v. Hussman Foodservice Co., Toastmaster Division*, 985 F. 2d 364 (CA7 1993); *Wallace v. Dunn*

Construction Co., 968 F. 2d 1174 (CA11 1992), *vacated pending rehearing en banc*, 32 F. 3d 1489 (1994).

In *McKennon,* the Court held that an employee discharged in violation of the Age Discrimination in Employment Act of 1967 is not barred from all relief when, after discharge, the employee's employer discovers evidence of wrongdoing that would have led to the employee's discharge on lawful and legitimate grounds had the employer known of it. A subsequent decision by the ARB held, in accordance with *McKennon,* that evidence of legitimate grounds for termination of employment, acquired by the employer after termination, does not defeat a discrimination complaint but is instead relevant to the issue of damages. *Timmons v. Mattingly Testing Services*, 95-ERA-40 (ARB June 21, 1996); *citing, McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879 (1995) and *Smith and Fitzpatrick v. Tennessee Valley Authority*, 89-ERA-12, slip op. at 2-6 (Sec'y May 17, 1995).

Consequently, while this post hoc evidence of grounds for termination may present evidence relevant to the calculation of damages, it is irrelevant to the determination of whether I&M legitimately terminated Tipton. Accordingly, I find that this stated basis fails to meet I&M's burden and does not provide a legitimate reason for Tipton's termination.

Moreover, I find that I&M's assertions on this matter are a disingenuous attempt to bolster its defense. Evidence and testimony establish that other employees at Cook Plant not only received the same sorts of e-mails but also forwarded them without suffering any personnel action. Molden testified that he received at least one of these e-mails, Complainant's Exhibit 39 & 39, from a subordinate, Robert Martindale. TR 1166. Yet, Martindale testified that he also sent the e-mail to Curtis Miles, as well as sending non-business e-mails sent to Stark, yet he received no counseling, warnings or suspensions because of sending these e-mails. TR 632-637, 639. According to Martindale, he was unaware of any way to stop from receiving e-mails. TR 635. He also believed that forwarding e-mails was what Plant management discouraged. *Id.* Molden admitted that he was aware of the Electronic Communications Policy at Cook Plant yet he did not discipline his subordinate for violating it. TR 1167. Sam Verma and Tony Chacon also testified that they received prohibited e-mails as well as sent them to others at Cook but received no discipline as a result. TR 596-610; RX 21-24, 27, 32, CX 10, 12. Verma admits to also being aware of the policy prohibiting use of Cook Plant computers for personal and inappropriate e-mails. TR 608.

I&M received their knowledge of the contents of Tipton's e-mail account in March 2002, as a result of this litigation. Even after discovery of the e-mails being forwarded and received by various members of Cook Plant staff, the record is devoid of disciplinary action taken against anyone, yet I&M now asserts that this discovery would have resulted in Tipton's termination. This assertion is tantamount to an acknowledgement that I&M would have treated Tipton differently had he still been employed. Where others were not counseled or warned about their violations and where management members admit to possessing direct knowledge of their subordinates' policy violations yet failed to take action, I&M's assertions receive no merit.[29]

[29] This also indicates an intent to enforce the policies against Tipton selectively.

Therefore, I&M fails to prove that it would have fired Tipton legitimately, in spite of his protected activity. Additionally, this disingenuous argument also fails to mitigate damages for the employer as discussed *infra*.

XIII Conclusion

The record demonstrates substantially that Kenneth Tipton proved by a preponderance of the evidence that his protected activity was more than likely a contributing factor to the adverse employment action. Furthermore, I&M has not proven by clear and convincing evidence that the proffered reasons; lying during the fact-finding investigation, failure to follow management directions, and past performance problems; for the termination are legitimate. The other circumstantial evidence: I&M's failure to follow personnel policies, the temporal proximity of the adverse action and the protected activity, the initiation of the investigation only on Tipton, the hostility towards the NRC's regulations, the mindset of Cook Plant management during September of 2001, and the disparate treatment between the various key personnel; combine to provide a preponderance of evidence weighing in Tipton's favor.

In sum, I&M has failed to establish the existence of legitimate, nondiscriminatory grounds for Tipton's termination. I have analyzed the grounds for termination advanced by I&M individually, and, when I consider the evidence propounded by I&M as a whole, I continue to find that it fails to meet its burden. The proffered reasons are disingenuous and intentionally polemic, and therefore, support a circumstantial finding that discriminatory intent is present under *Reeves*. *Supra.* Consequently, relief shall be accorded Tipton.

XIV. Damages and Remedies

Complainant seeks the following relief: 1) compensatory damages for emotional distress of $ 150,000; 2) back pay, including benefits, for the period from October 2, 2001, until July 29, 2003, of $ 117,912; and 3) Front pay, in lieu of reinstatement, totaling $ 91,038; 4) attorney's fees and costs; 5) A purge of Complainant's personnel file of the termination; 6) Posting of a favorable decision at I&M's Cook Plant and distributed to all Plant employees; and 7) a remand for findings of fact concerning Complainant's damages. Complainant's Post-hearing Brief at 157; CX 15.

A. Back pay

It is well established that "the goal of back pay is to make the victim[s] of discrimination whole and restore [them] to the position that [they] would have occupied in the absence of the unlawful discrimination." *Blackburn v. Martin*, 982 F.2d 125, 129, *citing Albermarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975). The evaluation of back pay due a complainant utilizes this principle. Tipton requests lost salary from October 2, 2001, to the last day of the hearing, July 29, 2003, as mitigated by his subsequent earnings. CX 15 at 1. Included in this amount are fringe benefits of 33% of his salary, a 3% base pay increase, and a 10% bonus for 2002. CX 15. He also requests the value of replacement benefits from November 11, 2001, to January 1, 2003; including medical and dental benefits.

Uncertainties in establishing the amount of back pay to be awarded are to be resolved against the discriminating party. *McCafferty v. Centerior Energy*, 96-ERA-6 (ARB Sept. 24, 1997). Interim earnings at a replacement job are deducted from back pay awards. *Williams v. TIW Fabrication & Machining, Inc.*, 88-SWD-3 (Sec'y June 24, 1992). Evidence that the complainant failed to mitigate damages will reduce the amount of the back pay owed. The respondent has the burden of establishing that the back pay award should be reduced because the complainant did not exercise diligence in seeking and obtaining other employment. *West v. Systems Applications International*, 94-CAA-15 (Sec'y Apr. 19, 1995). To meet this burden, the respondent must show that (1) there were substantially equivalent positions available; and (2) the complainant failed to use reasonable diligence in seeking these positions. The benefit of any doubt ordinarily goes to the complainant. Interim earnings, or an amount which could be earned with reasonable diligence, reduces a back pay award. *Doyle v. Hydro Nuclear Services*, 89-ERA-22 (ARB Sept. 6, 1996).

Tipton presents mitigation of by his subsequent earnings at a contracting job and at his eventual permanent position. As the Sixth Circuit has observed,

> A claimant is only required to make reasonable efforts to mitigate damages, and is not held to the highest standards of diligence. The claimant's burden is not onerous, and does not require him to be successful in mitigation. The reasonableness of the effort to find substantially equivalent employment should be evaluated in light of the individual characteristics of the claimant and the job market.

Rasimas, 714 F.2d at 624 (citations omitted).

Tipton bears the burden to mitigate his losses by seeking suitable employment and I find sufficient evidence that Tipton has done so. Under these facts, Tipton has mitigated his award by the amount of compensation earned since his termination. *Williams v. TIW Fabrication & Machining, Inc.*, Case No. 88-SWD-3 (June 24, 1992). This includes amounts earned at his current position and as a contractor. CX 15. However, Tipton has subtracted from his former I&M wages his overtime earnings at his current position. CX 15. Back pay awards should not be reduced for an employee who is paid by the hour and works overtime. In *Moder v. Village of Jackson, Wisconsin*, ARB Nos. 01-095 and 02-039, ALJ No. 2000-WPC-5 (ARB June 30, 2003). Where Tipton's actual earnings at his contract employment include overtime pay, the base pay only should be used to determine the post-mitigation amount.

While I&M bears the burden to establish that the back pay award should be mitigated, it failed to address this issue in its Post-hearing Brief. However, in order to prevent a possible double recovery, Tipton's unemployment benefits must be addressed. Unemployment benefits are compensation for loss of employment income. Because back pay awards are designed to make the complainant whole again, these benefits have been subtracted from back pay awards to prevent unjust enrichment or double recovery. *Graves Trucking, Inc. v. NLRB*, 692 F.2d 470, 475 n.4 (7th Cir. 1982) (deduction of employee's worker's compensation award from back pay). However, in *Williams v. TIW Fabrication & Machining, Inc.*, the Secretary held that unemployment compensation should not be deducted from a back pay award arguing that a

"statutory benefit to plaintiff should not reduce the judgment against defendant from its wrongful conduct." 88-SWD-3 (Sec'y June 24, 1992) (*citing Enstrom v. Beech Aircraft Corp.,* 712 F. Supp. 841, 853 (D. Kan. 1989). The United States Supreme Court held, in *NLRB v. Gullett Gin Co.*, that unemployment compensation is a "collateral benefit," that the failure to reduce a back pay award in a labor case by unemployment benefits did not make the employee more than "whole," and that the NLRB had the power to refuse to deduct unemployment compensation from back pay. 340 U.S. 361 (1951).

Since then, the Circuit Courts have been in conflict in the application of the two principles at stake: preventing double recovery or giving plaintiffs the gain of statutory benefits to the detriment of the wrongdoer. In the Sixth Circuit, under which jurisdiction this case lies, unemployment benefits received by claimants are not deducted from back pay awards. *Rasimas v. Michigan Dep't of Mental Health,* 714 F2d 614 (6th Cir. 1983), *cert den,* 466 US 950; *Mabin v. Lear Siegler, Inc.,* 457 F2d 806 (6th Cir. 1972). In accord, I find that the unemployment compensation received by Tipton shall not be deducted from his back pay award.

Turning to the issue of fringe benefits, an award for back pay may permissibly include fringe benefits. *Creekmore v. ABB Power Systems Energy Services, Inc.,* 93-ERA-24 (Dep. Sec'y Feb. 14, 1996). The burden of proof is on the plaintiff to prove damages, and a lack of evidence concerning fringe benefits amounts to a failure of proof precluding the award of any such damages. *See, e.g., Meadows v. Ford Motor Co.*, 510 F.2d 939 (6th Cir. 1975); *Rasimas v. Michigan Dept. of Mental Health,* 714 F.2d 614 (6th Cir. 1983); *Grubb v. W.A. Foote Memorial Hosp., Inc*., 759 F.2d 546 (6th Cir. 1985); *Gutzwiller v. Fenik*, 860 F.2d 1317 (6th Cir. 1988). To support an award for lost fringe benefits, Tipton relied on Joint Exhibits 30 to 32, detailing the benefits package available at Cook Plant. JX 30-32. His post-termination checklist provided the specific benefits provided to Tipton. *Id.*

The particular items included non-vested retirement, 22 days of vacation per year plus personal days; family medical and dental insurance; $190,000 in group life insurance; $190,000 in accidental death and dismemberment coverage; $380,000 in supplemental group life insurance, and $380,000 in supplemental accidental death coverage. I find that Tipton has met his burden of establishing his right to fringe benefits and an identification of those benefits he lost by his unlawful termination. Although the numeric figure or value of those benefits is estimated at 33% of salary, but not detailed with an aggregate value, I find that this figure is reasonable. Tipton met his burden of proof by detailing the type and amount of his fringe benefits. In reliance on the decision in *McCafferty,* I find that any perceived uncertainty in the exact dollar amount must be resolved in favor of Tipton and against the discriminator. *Supra.* Therefore, Tipton is entitled to an award of 33% of his salary for fringe benefits.

Where an employee's fringe benefits include medical and life insurance, a plaintiff should be compensated for the loss of those benefits if the plaintiff has purchased substitute insurance coverage or has incurred uninsured, out-of-pocket medical expenses for which he or she would have been reimbursed under the employer's insurance plan. *E.E.0.C. v. FarmerBros. Co.*, 31 F.3d 891, 902 (9th Cir. 1994). In *Crow v. Noble Roman's, Inc.*, 95-CAA-8 (Sec'y Feb. 26, 1996), the Administrative Law Judge recommended that, should the Complainant decline reinstatement, the Respondent would be required to reimburse the Complainant for medical costs

as part of the back pay award. Tipton requests reimbursement of his payments made under COBRA provisions and documented the same at Joint Exhibit 51. I find that he is entitled to these amounts.

In conclusion, Tipton is entitled to his mitigated back pay, including fringe benefits, and replacement health and dental payments. The record contains no offer of reinstatement and therefore, Complainant will be awarded these amounts.

B. Bonus and Pay Raise

In *Mosbaugh v. Georgia Power Co.,* the Secretary held that reasonable salary increases should be included in the award of back pay. 91-ERA-1 and 11 (Sec'y Nov. 20, 1995). I&M incorporated a double bonus pay system into their compensation scheme. CX 52. Respondent objects to the payment of any bonus, citing Tipton's poor performance history, and additionally, it contends that under the after-acquired evidence rule, no damages should be paid for the time beyond March of 2002 when it alleges he would have been terminated. I&M bases this on the discovery of non-business e-mails on Tipton's computer.

However, where I have already found that, subsequent to the discovery of the e-mails in Tipton's computer, I&M has failed to discipline the testifying e-mail senders or the other receivers of those same e-mails, I will not permit it to avoid liability under this rule. Had the senders, such as Martindale, received any discipline for sending the inappropriate e-mails, I might have entertained the idea that Tipton would have been fired for receiving them and storing them. *See,* CX 41 (offensive email from Martindale to Tipton and others), TR 628 (Martindale received no discipline for sending this or other inappropriate e-mails). Where the evidence in the record shows that neither senders nor receivers incurred enforcement of this policy, Respondent may not escape liability on the theory of after-acquired evidence by applying its policies only to Tipton.

To support his request for bonus pay, Tipton testified that in 2001 he received a year-end bonus of $2,900 and a restart bonus of $19,000. Respondent argues against payment of any bonus or salary increases, arguing that Tipton's performance problems would make him ineligible. However, this argument does not apply to the Incentive Plan formula, which is based on Plant performance not individual achievement. *See, Mosbaugh, supra.* Tipton submitted Complaint's Exhibit 52 outlining the 2002 Incentive Plan based on the number of days the Plant operated safely, the maximization of equipment reliability, the successful refueling outage and number of "Days of Excellence." CX 52. This bonus is tied to the operation of the Plant overall and not to an individual employee's performance. Consequently, I find that Tipton would have been eligible for an Incentive Plan bonus in 2002. Based on Tipton's status as an exempt non-supervisor, he would have received a 10% bonus in 2002 or $9,500. Complainant's Post-hearing Brief at 153, CX 15.

C. Front Pay

Claimant requests "Front Pay"[30] to compensate for the less lucrative position he now holds. CX 15. Respondent counters with e-mails received and sent by Tipton referencing his interest in other employment. I&M asserts that Tipton was seeking other employment and would not have remained at Cook Plant had he not been terminated. I find I&M's arguments unpersuasive because it failed to produce evidence that Tipton actually applied for or actively sought outside employment. The evidence contained in the submitted e-mails does not amount to evidence of Tipton's seeking outside employment but instead, reflect his general dissatisfaction with his work hours and management. Tipton testified credibly that he was not seeking outside employment and that he did not apply for the positions alluded to in the referenced emails. Therefore, I find that Front Pay is warranted and shall be awarded in accordance with Complainant's Exhibit 15 in the amount of $ 81,967 plus the 3% increase.

D. Attorney Fees

The ERA specifically permits the award of attorney fees:

> If an order is issued under this paragraph, the Secretary, at the request of the complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorney's and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

42 U.S.C. §5851(b)(2)(b) (1994).

Complainant may submit a Petition within thirty days of this decision detailing the "aggregate amount of all costs and expenses… reasonably incurred" by Tipton in this case. *Id.* Supportive documentation must be attached. Thereafter, Respondent shall have twenty days within which to challenge the payment of costs and expenses sought by Complainant; and Complainant shall then have ten days within which to file any reply to Respondent's response.

E. Purging of Tipton's Records

Tipton requests removal of all documentation of his termination from his personnel file and positing of this decision at I&M's Cook Plant. In *Doyle v. Hydro Nuclear Services*, 89-ERA-22 (ARB Sept. 6, 1996), the respondent was ordered to expunge from complainant's records all derogatory or negative information related to the failure to hire him, to provide neutral employment references, not to divulge any information pertaining to not hiring complainant or denying him unescorted access to a nuclear facility, and to post the ARB's decision.

[30] I find no offer of reinstatement present in this case. Tipton expressed a desire for reinstatement but also expressed trepidation about his potential treatment after bringing this case. TR 865.

I find that Tipton's remedial action is warranted where the stated reasons for his termination are false. Respondent is thereby ordered to purge any documents referencing or emanating from the fact-finding investigation or the recommendation of termination or suspension. Included is any documentation involving his denial of access to the Plant. Additionally, I&M is ordered to post copies of this decision in the common areas of the Plant for sixty (60) days and to ensure that it is not defaced, altered or covered. *Zinn v. University of Missouri*, 93-ERA-34 and 36 (Sec'y Jan. 18, 1996).

F. Compensatory Damages

For asserted pain and suffering, and loss of professional reputation, Tipton requests $150,000 in damages. To support this demand, Tipton supplied receipts from post-termination counseling he applied for in January of 2002, and received in March and April of 2002, along with his testimony and that of Mrs. Tipton. CX 14. His application for counseling services states stress from job loss and family issues caused depression. He attended counseling four sessions - one alone and three with his wife. Included in the exhibit are notes from his therapist indicating stress related to his termination and attendant financial worries. CX 14 at 5. Tipton testified that he suffered emotional distress, significant financial concerns, depression, shame, relationship difficulties, loss of professional reputation and embarrassment. TR 854-867.

Ms. Tipton testified that Tipton suffered from nightmares after his termination and also that their relationship deteriorated due to his job stress and financial concerns. TR 1805. She also noted that the nightmares occurred before his termination as well as after and therefore, I find they cannot be directly attributable to his wrongful termination. Ms. Tipton also testified that Tipton experienced a "twitching eye" for about two weeks and sleeplessness as a manifestation of his stress. TR 1805.

Compensatory damages may be awarded under the environmental statutes for pain and suffering including mental anguish, embarrassment and humiliation caused by the discriminatory treatment. *Berkman v. U.S. Coast Guard Academy*, ARB 98-056, ALJ No. 1997-CAA-2, at 29 (February 29, 2000). Emotional distress cannot be presumed, and compensatory damages for mental and emotional distress cannot be awarded "without proof that such injury actually was caused." *Carey v. Piphus,* 435 U.S. 247, 263-4 (1978). The complainant has the burden of proving the existence and magnitude of subjective injuries. *Blackburn v. Metric Constructors, Inc.,* 86-ERA-4 (Sec'y Oct. 30, 1991). In *Blackburn,* the Secretary declined to adopt the Administrative Law Judge's recommendation of compensatory damages for emotional distress and mental anguish where the complainant alleged emotional stress and mental anguish, family problems, and loss of self-esteem resulted from his diminished financial situation. He claimed these were brought about because of his inability to find a job following his unlawful termination, however, the record failed to support the allegation of a drastic change in the complainant's financial situation.

Contrary to the facts in *Gutierrez v. Regents of the University of California,* where the ARB found that complainant had not established entitlement to compensatory damages, where the sole evidence of record dealing with mental suffering or emotional anguish consisted of complainant's own testimony, here Tipton presents documented evidence of his emotional

distress. ARB No. 99 116, ALJ No. 1998 ERA 19 (ARB Nov. 13, 2002). Tipton offers the reports of his treating therapist to supplement his own testimony. Additionally, I found the testimony of Ms. Tipton to be very credible and probative. She corroborated Tipton's testimony regarding his stress, depression, and financial strain. *Supra.* Respondent argues that Tipton's family problems existed before his termination and submitted evidence of e-mails from Ms. Tipton bear this out. However, the therapist's documents indicate that Tipton suffered depression and stress over his termination and job loss, with attendant financial constraints, needing counseling sessions with his wife. CX 14. In sum, I find that Tipton's evidence, unlike the unsubstantiated evidence in *Gutierrez,* demonstrates that he suffered from depression, stress, family problems, and embarrassment directly, albeit not solely, related to his termination.

However, it is not sufficient to show the existence and causation of Tipton's injuries. Competent evidence must prove not only the existence but also the magnitude of subjective injuries. *Creekmore v. ABB Power Systems Energy Services, Inc.***,** 93-ERA-24 (Dep. Sec'y Feb. 14, 1996). In *Creekmore,* the Deputy Secretary found ample evidence of emotional distress to justify compensatory damages of $40,000. Such evidence included the complainant's testimony of embarrassment in explaining while job seeking why he was laid off; of emotional turmoil due to the disruption to him and his family from temporary consulting work at a distance and eventual relocation; of his panic about being able to pay his bills resulting in his request for distribution of his retirement thereby incurring substantial taxes and penalties. I find that the same evidence presented in *Creekmore* is present here.

In *Crow v. Noble Roman's, Inc.*, there was evidence that the complainant could not afford health insurance after the discharge and received food stamps for a period. He testified that he had very little money and "it was pretty hard." 95-CAA-8 (Sec'y Feb. 26, 1996), *citing Blackburn v. Martin*, 982 F.2d 125, 131 (4th Cir. 1992) (ERA case). The Secretary found that this testimony was sufficient to establish entitlement to $10,000 in compensatory damages. The Secretary cited three other cases in which $10,000 had been awarded as compensatory damages. In *Opthof v. Ashland Chemical Co.***,** 94-CAA-7 (ALJ May 8, 1995), the complainant sought compensatory damages for emotional distress and loss of professional reputation. The Administrative Law Judge found that the sequence of events supported a finding that the workplace situation and the discharge caused the complainant significant anxiety and emotional stress; he found that the medical evidence divorcing the distress from the protected activity and the discharge flew in the face of the record.

The judge could not allocate with any precision the degree to which the distress related to Respondent's illegal motives as opposed to valid business considerations. The Administrative Law Judge concluded that the award should be modest ($500), however, given chronic friction between the complainant and his supervisors for which the complainant was partly responsible and which pre-existed the protected activity. In addition, the record established that the complainant was a difficult employee.

In *Blackburn v. Metric Constructors, Inc.,* 86-ERA-4 (Sec'y Aug. 16, 1993), the Secretary issued a Final Order on Compensatory Damages on remand from the Fourth Circuit who ruled that the Secretary had viewed the claim too narrowly. *See, Blackburn v. Martin, sub nom.,* 982 F.2d 125 (4th Cir. 1992). The Court emphasized that compensatory damages are

appropriate for mental anguish when the economic impact cannot be quantified, and found that a fair reading of at least part of the hearing testimony attributed complainant's loss of self-esteem and emotional problems to the fact that he was fired, apart from any financial consequences of the termination. *Blackburn,* 982 F.2d at 132. In reviewing the relevant evidence and considering the facts in light of awards in other decisions involving emotional distress, the Secretary found that $5,000 in compensatory damages was an appropriate award although the Administrative Law Judge had awarded $10,000. *See Varnadore v. Oak Ridge National Laboratory***,** 92- CAA-2, 5 and 93-CAA-1 (ALJ June 7, 1993) (award of $10,000 in compensatory damages for emotional distress). The Secretary found probative the fact that the claimant did not seek professional counseling. *But see, Smith v. Littenberg*, 92-ERA-52 (Sec'y Sept. 6, 1995), citing *Blackburn v. Metric Constructors, Inc.*, 86- ERA-4 (Sec'y Aug. 16, 1993) (professional counseling not required for an award of compensatory damages).

In *Lederhaus v. Donald Paschen & Midwest Inspection Service, Ltd.,* 91-ERA-13 (Sec'y Oct. 26, 1992), slip op. at 11-13, the Secretary reviewed the complainant's evidence concerning emotional distress resulting from his retaliatory discharge, and compared the circumstances to those of other emotional distress awards,[31] and found that the complainant was entitled to $10,000 in compensatory damages. Corroborated testimony showed that: the complainant was without a job for five and one half months, during that time he and his wife were constantly harassed by bill collectors, and had to borrow money; the complainant became depressed and angry, and contemplated suicide; the complainant's family life suffered; he argued with his wife over money, and he cut off contact with relatives because of embarrassment over the lack of money.

Turning to the facts at issue, Tipton did seek counseling, along with his wife, to address his job loss-related stress, financial concerns, and depression, which then led to family problems. Unlike the facts in *Blackburn,* Tipton's stress and depression caused him to seek out professional services in January of 2002, and to avail himself of treatment during the month of April. As to Mrs. Tipton's testimony that Tipton suffered physical effects from his job loss, I will accord great probative value to that as well as to the testimony of Tipton, especially in light of my credibility findings. I also find relevant the testimony regarding the Tipton family's financial strain where Tipton was the sole provider for himself, Ms. Tipton, their son and, presumably, for his stepdaughter and incurred debt during his unemployed period. TR 855. Additionally, Tipton was unemployed for a much longer period than the complainant *Lederhaus.*

---

[31] The cases the Secretary compared were *McCuistion v. Tennessee Valley Authority,* 89-ERA-6 (Sec'y Nov. 13, 1991), slip op. at 21-22 ($10,000 award; complainant harassed, blacklisted and fired; forfeited life, health and dental insurance; unable to find other employment; exacerbated preexisting hypertension and caused stomach problems; sleeping difficulty, exhaustion, depression and anxiety). *DeFord v. Tennessee Valley Authority,* 81- ERA-1 (Sec'y Apr. 30, 1984), slip op. at 2-4 ($10,000 award; medical expenses related to termination; stress, anxiety and depression for which he was still being treated at the time of the Secretary's order); *Johnson, et al. v. Old Dominion Security,* 86-CAA-3, 4 & 5 (Sec'y May 29, 1991), slip op. at 25-28 ($2,500 award for each complainant; complainants had sustained prolonged exposure to chemicals that caused flu-like symptoms, skin irritation, and in one case, a gland enlargement; after fired, subject to anxiety related to economic uncertainty, bills and loans they were forced to delay paying, finding other work). *Blackburn v. Metric Constructors, Inc.,* 86- ERA-4 (Sec'y Oct. 30, 1991) (Decision on damages and attorney fees), slip op. at 14-17 (zero award; complainant suffered little if any economic harm which would have tended to support his assertions of loss of self-esteem and mental distress).

Respondent opposes an award based on familial troubles and offers several e-mails written by Mrs. Tipton to Mr. Tipton concerning existing relationship problems as evidence that these issues predated his termination. However, I do not find these persuasive due to the lack of temporal proximity to the termination and additionally, I find more persuasive, the fact that the counseling sessions specifically addressed the added stress of Tipton's job loss on his relationship with his wife. It is insignificant whether this additional stress instigated or merely exacerbated familial or marital difficulties. Compensatory damages are awarded for mental anguish or emotional suffering which is causally related to the discriminatory action.

Consequently, I find that Tipton suffered emotional distress, depression, and embarrassment, as well as financial strain related to his job loss. As to his assertions that his professional reputation was harmed, I find the testimony on this point too elusive to warrant an award. Mr. and Ms. Tipton both testified to "rumors" and feelings of discomfort when in the company of other employees from Cook. Tipton said that stories floated around their small community about his termination for lying and that individuals spurned him while in public. Ms. Tipton related that Tipton suffered due to the misconceptions regarding his performance at Cook. While I find that this evidence supports an award based on humiliation and embarrassment, they are too vague to warrant an award due to a damaged professional reputation.

Individual opinions of ex-co-workers, even if unwarranted, do not necessarily indicate harm to Tipton's professional opinion. Tipton does not allege any loss of job opportunities due to his termination or to the erroneous assumption of those in the community. Where there is no showing that the opinions of the referenced community members negatively influenced potential employers, I find insufficient evidence to make an award on this basis.

After review of the above-cited cases, I find that Tipton's evidence and declarations of damages most closely resemble those in *Creekmore v. ABB Power Systems Energy Services, Inc.,* albeit to a lesser degree. *Supra.* Consequently, Tipton is entitled to an award of $25,000 for his emotional distress, embarrassment, and financial strain. Whereas Tipton received psychological treatment for his stress, depression, and financial difficulties, where he was unemployed for eight months, out of permanent employment for over 15 months yet was the sole provider for his family, where he experienced physical manifestations of stress and depression, and where he sufficiently demonstrated that his family relationships suffered, I find that this award is justified.[32]

Based on the foregoing findings of fact and conclusions of law and upon the entire record, I recommend that Complainant, Kenneth Tipton, be awarded the following remedy:

[32] The cases cited in above and in the previous footnote are as much as twenty-three years old and consequently, Mr. Tipton warrants a larger amount to provide a comparable award.

RECOMMENDED ORDER

1. I&M shall pay to Kenneth Tipton the sum of $ 103,205 in back pay and medical coverage replacement plus appropriate interest at the IRS rate, computed until the date of payment to Complainant. To this amount the overtime pay used to mitigate Tipton's damages shall be added.

2. I&M shall pay to Kenneth Tipton $9,500 in bonus pay with a three percent increase.

3. I&M shall purge Tipton's personnel file as outlined above and shall post copies of this decision in the common areas of Cook Plant.

4. I&M shall pay Tipton's attorney's fees in the amount to be determined after briefing.

5. I&M shall pay Tipton front pay of $ 81,967 with a three percent increase.

6. I&M shall pay compensatory damages of $ 25,000.

7. I&M shall pay Tipton the value of his lost fringe benefits in the amount of 33% of his pay.

8. Both Parties shall submit their respective briefs within the time stated regarding attorney fees.

A

JOSEPH E. KANE
Administrative Law Judge

NOTICE:

Review of the Decision and Order issued in the above captioned matter is by the Administrative Review Board pursuant to §§ 4.c.(39) of the Secretary's Order 2-96, 61 Fed. Reg.19978 (1996) and 29 C.F.R. § 1979.110. That Order provides the Administrative Review Board with delegated authority and assigned responsibility to act for the Secretary of Labor in issuing final agency decisions on questions of law and fact arising in review or on appeal of certain enumerated decisions and recommended decisions by Administrative Law Judges. This

delegation includes any laws subsequently enacted, which by statute provide for final decisions by the Secretary of Labor upon review of decisions or recommended decisions issued by Administrative Law Judges. Absent an appeal, this Decision and Order and the administrative file in this matter will not be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, D.C. 20210. See 5 U.S.C. §§ 557(b).